(24,792)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 511.

UNION NATIONAL BANK AND CLAUD GATCH, SUBSTITUTED FOR H. N. MORRIS, AS RECEIVER OF SAID UNION NATIONAL BANK, PLAINTIFFS IN ERROR,

vs.

GEORGE McBOYLE AND LULU MAY McBOYLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

	Original.	Print
Caption	a	1
Transcript from the superior court of Alameda county, California	1	1
Amended complaint	2	1
Answer	6	3
Stipulation to make receiver party	12	6
Decision, first trial	14	7
Findings of fact	15	7
Conclusions of law	31	14
Judgment	34	15
Clerk's certificate to judgment roll	37	16
Notice of appeal from judgment	38	17
Notice of appeal from order denying new trial	39	17
Remittitur from supreme court of California	40	18
Amended answer	42	18
Decision, second trial	48	21
Findings of fact	49	22
Conclusions of law	57	25
Judgment	58	25
Clerk's certificate to judgment roll	61	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 18, 1915.

	Original.	Print
Bill of exceptions	62	27
Testimony of George McBoyle	64	28
Plaintiffs' Exhibit A—Promissory note, January 3, 1907	65	28
Defendants' Exhibit I—Certificate of stock	77	33
Testimony of George Schammel	86	37
Minutes of January 4, 1907	89	38
Minutes of January 8, 1907	91	39
Minutes of January 11, 1907	92	39
Testimony of George McBoyle (recalled)	93	40
Defendants' Exhibit I—Letter to McBoyle, January 19, 1907	94	40
Defendants' Exhibit 3—Letter to McBoyle, January 21, 1907	99	42
Minutes of January 19, 1907	100	43
Deposition of C. E. Palmer	102	44
Testimony of George McBoyle (recalled)	120	50
Notice of appeal from judgment	123	52
Assignment of errors	124	52
Errors of law	124	52
Insufficiency of the evidence	125	53
Decision against the law	129	54
Stipulation as to bill of exceptions	130	55
Judge's certificate to bill of exceptions	131	55
Notice of appeal from judgment	131	55
Stipulation as to transcript	132	55
Clerk's certificate to transcript	133	56
Opinion on first appeal	135	56
Opinion on second appeal	140	60
Petition for writ of error	142	61
Assignment of errors	144	62
Writ of error	147	63
Citation and service	150	64
Stipulation as to bond, &c	153	65
Præcipe for record by plaintiffs in error	156	66
Præcipe for record by defendants in error	159	68
Clerk's certificate	162	69
Certified copy of judgment	164	69

a

S. F., No. 6976.

In the Supreme Court of the State of California.

GEORGE McBOYLE and LULU MAY McBOYLE, Plaintiffs and Respondents,

vs.

UNION NATIONAL BANK (a Corporation) and H. N. MORRIS, as Receiver of said Union National Bank (a Corporation), Defendants and Appellants.

Transcript on Appeal from Judgement of the Superior Court of the State of California in and for the County of Alameda.

Honorable Wm. S. Wells, Judge.

Fitzgerald, Abbott & Beardsley, Fitzgerald & Abbott, Leon A. Clark, Attorneys for Appellants.

T. C. Coogan, Powell & Dow, W. H. Orrick, Attorneys for Respondents.

Filed this 25th day of April, 1914.

B. GRANT TAYLOR, *Clerk,*

By M., *Deputy Clerk.*

1

S. F., No. —.

In the Supreme Court of the State of California.

GEORGE McBOYLE and LULU MAY McBOYLE, Plaintiffs and Respondents,

vs.

UNION NATIONAL BANK (a Corporation) and H. N. MORRIS, as Receiver of said Union National Bank (a Corporation), Defendants and Appellants.

Transcript on Appeal from Judgment of the Superior Court of the State of California in and for the County of Alameda.

Honorable Wm. S. Wells, Judge.

2 In the Superior Court of the County of Alameda, State of California, Dept. No. 3.

No. 24619.

GEORGE McBOYLE and LULU MAY McBOYLE, Plaintiffs,

vs.

UNION NATIONAL BANK (a Corporation), Defendant.

Amended Complaint.

Now come the plaintiffs in the above-entitled action, and by leave of court first obtained file this their amended complaint in said action, and allege that:

I.

At all the times herein mentioned, and at the commencement of said action, the defendant, Union National Bank, was, and now is, a corporation organized and existing under and by virtue of an act of congress of the United States.

II.

At all the times herein mentioned, and at the commence-
3 ment of said action, Burnham-Standeford Company was, and now is, a corporation organized and existing under and by virtue of the laws of said state of California, for the purpose of conducting a planing-mill business therein, and during the times herein mentioned, it has carried on such business and is now carrying on the same in the city of Oakland, in said county of Alameda.

III.

Plaintiffs George McBoyle and Lulu May McBoyle, are now, and were at the commencement of said action, and at all times herein mentioned, husband and wife.

IV.

At all the times herein mentioned, the capital stock of said Burnham-Standeford Company was, and now is, divided into two thousand four hundred (2,400) shares, of the par value of fifty (50) dollars each. At all of said times, eighteen hundred and three (1803) shares of said stock were, and are now, issued.

V.

On or about the 3rd day of January, 1907, at the city of Oakland, California, plaintiff, Lulu May McBoyle, being then
4 and there in possession of and owning that certain certificate numbered 59, representing 599 shares of the capital stock of said Burnham-Standeford Company, delivered the possession of said certificate to, and pledged said 599 shares with, defendant, as security for the payment of a certain promissory note, for $9,500 and interest, executed by plaintiff George McBoyle, and dated on — about said 3rd day of January, 1908, and payable on demand; defendant then and there received said 599 shares and took possession of said certificate as such pledge, and not otherwise.

VI.

On the 1st day of February, 1907, at the city of Oakland, California, the plaintiffs, and each of them, tendered and offered to pay to the said defendant, the said sum of nine thousand five hundred (9,500) dollars, together with all interest then due thereon, and

at the same time demanded the delivery to them of the said certificate and stock so held by it as security as aforesaid. Said defendant then and there refused, ever since has refused, and now refuses, to accept the payment of said promissory note, or to deliver to plaintiffs or either of them, the said stock and certificate, or either or any part thereof, and then and there converted said certificate and stock, and ever since has been and now is in possession thereof. Plaintiffs, ever since the said 1st day of February, 1907, have been, and now are, ready, able and willing to pay the said indebtedness to said defendant, and hereby offer to pay the same, upon return of said stock and certificate.

Wherefore, plaintiffs pray judgment against defendant for the recovery and restitution of said 599 shares of the capital stock of said corporation, and the said certificate representing the same; for costs of suit; and for such other further and additional relief as is meet in the premises.

POWELL & DOW,
T. C. COOGAN,
Attorneys for Plaintiffs.

(Duly verified.)

(Endorsed:) Service of the within is here acknowledged this 5th day of November, A. D. 1908. Gibson & Woolner, M. C. Chapman, Attorneys for Defendant.

Filed Nov. 5th, 1908.

JOHN P. COOK,
County Clerk,
By GEO. H. STRICKER,
Deputy Clerk.

6 [Title of Court and Cause.]

Answer to Amended Complaint.

Now comes the defendant in the above entitled action and for answer to the amended complaint of plaintiffs on file herein, denies and avers as follows:

I.

Admits the allegations of paragraphs I, II, III and IV of said amended complaint.

II.

Denies that on or about the 3rd day of January, 1907, or at any other time, or at the city of Oakland, California, or elsewhere, or at all, the plaintiff Lulu May McBoyle was in possession of or owned that certain certificate No. 59, representing 559 shares, or any number of shares, or any certificate representing any number of shares

of the capital stock of the said Burnham-Standeford Company, or that she then or there, or elsewhere or at all, delivered the possession of said certificate to or pledged said 559 shares or any number of shares with the defendant as security for the payment of a certain promissory note, or any promissory note for $9,500 and in-
7 terest, executed by plaintiff George McBoyle, or dated on or about the 3rd day of January, 1907, or payable on demand, or for any other purpose or at all. Denies that defendant then or there received said 599 shares or took possession of said certificate as such pledge.

And in connection with the foregoing denial the defendant avers: That it, the Union National Bank, was on the 3rd day of January, 1907, and for a long time prior thereto, the owner of and in possession of that certain certificate No. 59, representing 599 shares of the capital stock of the said Burnham-Standeford Company. That Charles E. Palmer was on said 3rd day of January, 1907, and for a long time prior thereto had been the cashier of said defendant bank. That on said 3rd day of January, 1907, and for a long time prior thereto, plaintiff George McBoyle was president and a large stockholder of said company, and directed, controlled and managed the business of said Burnham-Standeford Company, and as such president and manager well knew and was familiar with the value of the stock of said company. That on or about the said 3rd day of January, 1907, the said George McBoyle applied to the cashier
8 of the defendant, Charles E. Palmer, and asked to purchase said stock, and then and there fraudulently stated to the said cashier that said stock was not worth to exceed eleven thousand ($11,000) dollars. That the said George McBoyle well knew at the time he made said statement that the said stock was worth and of the value of about sixty thousand ($60,000) dollars. That the said cashier, Charles E. Palmer, did not know the true value and worth of said stock, nor did he know that the said stock was of the value of about sixty thousand ($60,000) dollars, or any sum in excess of the said sum of eleven thousand ($11,000) dollars, and that the said Charles E. Palmer was ignorant of the true value and worth of said stock the said George McBoyle well knew. That said Burnham-Standeford Company, acting through its president, the said George McBoyle was on said 3rd day of January, 1907, and for a long time prior thereto had been a large depositor in and a large borrower from the said Union National Bank, and that by reason of said depositing and said borrowing the said George McBoyle was intimately acquainted with and known to the said Charles E. Palmer, the cashier of the said Union National Bank, and he the said McBoyle
9 discussed with the said cashier the business affairs of said Burnham-Standeford Company and for this reason the relations existing between the said Charles E. Palmer and the said George McBoyle on the 3rd day of January, 1907, were intimate and confidential. That the said Charles E. Palmer fully relied upon the statements of the said George McBoyle whom he knew to be president of and a large stockholder in the said Burnham-Standeford Company, and while so relying attempted to make the sale of the said stock for fifteen hundred ($1500) dollars cash, and the promis-

sory note of the said George McBoyle for the further sum of nine thousand five hundred ($9,500) dollars. That all of the acts and representations of the said George McBoyle were fraudulent and done with the intent to defraud and deceive the said Charles E. Palmer and the defendant bank as to the value of said stock, said George McBoyle well knowing that the said Charles E. Palmer would rely upon the statements made by the said George McBoyle as to its value, and that the said Charles E. Palmer did so rely on the said statements when he agreed to sell the said stock to the said George McBoyle.

That the said Charles E. Palmer in attempting to make said sale to the said George McBoyle acted beyond his power and
10 authority as cashier of the defendant, and without the consent or authorization of the defendant or its board of directors. That said defendant immediately, and as soon as the facts became known to its board of directors, and on or about the 4th day of January, 1907, notified the said McBoyle that the said cashier was without any authority to sell said stock, and immediately tendered to said McBoyle at his place of business said note and fifteen hundred dollars ($1500) in cash with interest, both and all of which the said McBoyle refused to accept, and immediately upon said refusal the defendant placed the note and the said sum of $1,500 in the Oakland Bank of Savings, subject to the order of said George McBoyle, and so notified the said George McBoyle.

III.

Further answering the defendant avers on its information and belief that the said George McBoyle was the real party in interest, and the allegation that Lulu May McBoyle is now the owner of said stock is a subterfuge and is in fact untrue.

IV.

Denies that on the first day of February, 1907, or at the city
11 of Oakland, California, or any other place, or ever or at all the plaintiffs, or either of them, tendered or offered to pay the said defendant the sum of nine thousand five hundred ($9,500) dollars, together with interest then due thereon, or any other sum whatever, or at the same time demanded the delivery to them of said certificate of stock so held by it as security as aforesaid in said amended complaint;

V.

Admits that the said defendant refused and does now refuse to accept payment of said promissory note or to deliver to plaintiffs, or either of them, the said stock and said certificate, or either or any part thereof;

VI.

Denies that said certificate was ever converted or the stock or any portion thereof ever was converted, and in this behalf denies that

the said bank, the defendant herein, ever parted with the possession or the ownership of said stock, and admits that it now has the same in its possession;

VII.

Alleges that defendant has no information or belief on the
12 subject sufficient to enable it to answer the allegation that the plaintiffs since the first day of February, 1907, or ever or at all, have been or now are ready, able or willing to pay said pretended indebtedness to said defendant, and placing its denial on that ground denies the same.

Wherefore, the defendant prays judgment that the plaintiffs take nothing by their action, and for costs of suit.

M. C. CHAPMAN,
B. F. WOOLNER,
Attorneys for Defendants.

FITZGERALD & ABBOTT,
Of Counsel.

[Duly verified.]

(Endorsed:) Filed Nov. 17, 1908. John P. Cook, County Clerk, by W. W. Crane, Deputy Clerk.

[Title of Court and Cause.]

Stipulation Making Receiver a Party and as to said Receiver's Answer.

It is hereby stipulated and agreed by and between the parties hereto that H. N. Morris, receiver of the Union National
13 Bank, may be made a party defendant with said Union National Bank without service or summons, and it is further stipulated that the answer on file shall stand as and be the answer of the said H. N. Morris, receiver as aforesaid.

POWELL & DOW,
T. C. COOGAN, &
W. H. ORRICK,
Attorneys for Plaintiff.
FITZGERALD & ABBOTT,
Attorneys for Defendant Union National Bank and H. N. Morris, Receiver.

(Endorsed:) Filed Sept. 7, 1909. John P. Cook, Clerk, by W. W. Crane, Deputy Clerk.

14 In the Superior Court of the State of California in and for the County of Alameda, Dept. No. 3.

No. 24619.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,

vs.

UNION NATIONAL BANK (a Corporation) and H. N. MORRIS, as Receiver of said Union National Bank (a Corporation), Defendants.

Decision.

This cause came on regularly for trial on the 9th and 10th days of August, 1909, before the court sitting without a jury, a trial by jury having been waived by the parties hereto. Mr. T. C. Coogan, Messrs. Powell & Dow, and Mr. W. H. Orrick appearing as counsel for the plaintiffs, and Mr. M. C. Chapman, Mr. B. F. Woolner, Messrs. Fitzgerald & Abbott, and Mr. Leon A. Clark appearing for the defendant Union National Bank, and also for defendant H. N. Morris as receiver of said Union National Bank, who during the progress of said trial and on the 9th day of August, 1909, by
15 consent of counsel for both plaintiff and for defendant Union National Bank, and himself, was, by order of said court then duly given and made, joined as a party defendant with said defendant Union National Bank. It was stipulated and agreed by and between said plaintiff and said defendants that the answer of said defendant Union National Bank to the amended complaint of plaintiff on file herein should be considered as, and should be and stand as the answer of said defendant H. N. Morris as receiver of said defendant Union National Bank. Evidence, both oral and documentary, was introduced on behalf of the respective parties, and thereupon the case was submitted to the court for its decision, and now the court being fully advised in the premises, and after having fully considered said evidence, makes the following findings of fact and conclusions of law, to-wit:

Findings of Fact.

I.

That the defendant Union National Bank of Oakland is now, and at all times mentioned in the amended complaint was, a corporation organized and existing under and by virtue of an act of con-
16 gress of the United States, and during all of the times mentioned in the amended complaint, and up to the commencement of this action, was engaged in carrying on the business of a national bank in the city of Oakland, county of Alameda, state of California.

II.

That on or about the 14th day of April, 1909, after proce-dings duly taken for that purpose, in accordance with the national banking laws, the comptroller of currency duly appointed Edwin F.

Rorebeck as receiver of said Union National Bank of Oakland; that thereupon said Edwin F. Rorebeck duly qualified as such receiver in accordance with said order of appointment of said comptroller of currency, and said Edwin F. Rorebeck ever since said 14th day of April, 1909, and until the 14th day of May, 1909, continued to be the duly appointed, qualified and acting receiver of said Union National Bank of Oakland; that on the 14th day of May, 1909, said Edwin F. Rorebeck, under and in pursuance of an order of the comptroller of currency, resigned and ceased to be such receiver, and plaintiff, H. N. Morris, was on the 14th day of May, 1909, by the said comptroller of currency, duly appointed as receiver
17 of said bank in place and stead of said Edwin F. Rorebeck; that thereafter, to-wit, on the 14th day of May, 1909, said H. N. Morris duly qualified as such receiver, in accordance with said order of appointment of said comptroller of currency, and said H. N. Morris ever since said 14th day of May, 1909, has been, and now is, the duly appointed, qualified and acting receiver of said Union National Bank of Oakland, and ever since said last mentioned day has been in the possession of the books, records and assets of every description of said Union National Bank of Oakland, and is now collecting all debts, dues and claims belonging to said bank.

III.

That at all times mentioned in the amended complaint, and at the commencement of this action, Burnham-Standeford Company was a corporation organized and existing under and by virtue of the laws of said state of California, for the purpose of conducting a planing mill business therein, and during the times mentioned in said amended complaint, and at the commencement of this action, was carrying on such business in the city of Oakland, in said county of Alameda.

18 IV.

That plaintiffs, George McBoyle and Lulu May McBoyle, at all times mentioned in the amended complaint, and at the commencement of said action, were and now are husband and wife.

V.

That at all times mentioned in the amended complaint the capital stock of said Burnham-Standeford Company was, and now is, divided into 2400 shares of the par value of $50 each; that at all of said times 1803 shares of said stock were and are now issued.

VI.

It is not true that on or about the 3rd day of January, 1907, or at any other time or at the city of Oakland, California, or elsewhere, or at all, the plaintiff Lulu May McBoyle was in possession of or

owned that certain certificate numbered 59 representing 599 shares or any number of shares of the capital stock of the said Burnham-Standeford Company, or that she then or there or elsewhere, or at all, delivered the possession of said certificate numbered 59 to or pledged said 599 shares or any number of shares with the
19 defendant Union National Bank as security for the payment of a certain promissory note, or any promissory note, for $9,500 and interest, or for any sum, or executed by plaintiff George McBoyle, or dated on or about the 3rd day of January, 1907, or payable on demand, or for any other purpose or at all; that it is not true that said Lulu May McBoyle delivered the possession of said certificate numbered 59 to, or pledged said 599 shares of said stock with the defendant Union National Bank, or that said defendant Union National Bank then or there, or at any time, or at all, received said 599 shares, or took possession of such certificate as such pledge.

VII.

That on or about the 3rd day of January, 1907, Plaintiff Lulu May McBoyle was not in possession of and did not own that certain certificate numbered 59 representing 599 shares of the capital stock of the said Burnham-Standeford Company, and she did not deliver the possession of said certificate to or pledge said 599 shares with the defendant Union National Bank as security for the payment of a certain promissory note, or any promissory note for $9,500, and interest, or for any sum, executed by plaintiff George Mc-
20 Boyle, or dated on or about the 3rd day of January, 1907, or payable on demand, or for any other purpose, or otherwise, or at all; that defendant Union National Bank did not then or there, or at all, receive said 599 shares or take possession of such certificate as such pledge.

VIII.

That defendant Union National Bank was on the 3rd day of January, 1907, and for a long time prior thereto had been the owner of and in possession of that certain certificate numbered 59, representing 599 shares of the capital stock of the said Burnham-Standeford Company; that on said 3rd day of January, 1907, and for a long time prior thereto, plaintiff, George McBoyle, was the president and a stockholder of said company and managed the business of said Burnham-Standeford Company; that on said 3rd day of January, 1907, Charles E. Palmer was, and for many years had been an officer, viz., the cashier of said defendant Union National Bank, and was and many years had been the secretary of the board of directors of said Union National Bank. that on or about the 3rd day of January, 1907, said George McBoyle applied to said Charles E. Palmer, the cashier of said defendant Union Na-
21 tional Bank at its banking house in the city of Oakland, county of Alameda, state of California, and asked to purchase said 599 shares of said stock of said bank; but it is not true

that said George McBoyle then or there fraudulently or otherwise stated to the said cashier of said bank, or any agent thereof, that said stock was not worth to exceed eleven thousand dollars ($11,000), or that the said George McBoyle knew at the time that the said stock was worth and of the value of about $60,000; but that it is true that on the 3rd day of January, 1907, the said George McBoyle offered to buy said 599 shares of stock from said bank for the sum of $11,000 to be paid for as follows, to-wit: The sum of $1,500 in cash and the balance of $9,500 to be paid by a promissory note for the principal sum of $9,500 with interest at the rate of six (6%) per cent per annum, to be executed by plaintiff George McBoyle and payable to said Union National Bank on demand, the payment of said promissory note to be further secured by the pledging to said bank of said certificate numbered 59, representing said 599 shares of said stock, as collateral security for the payment of said note.

Said cashier Charles E. Palmer did not know that said
22 599 shares of said stock were worth more than the amount that was offered for it by said George McBoyle, and did not know the true value and worth of said stock, and did not know the said stock to be of the value of any sum in excess of the sum of $11,000; but it is not true that the said George McBoyle knew that the said Charles E. Palmer was ignorant of the true value and worth of said stock. That said Burnham-Standeford Company, acting through its president, George McBoyle, was on said 3rd day of January, 1907, and for a long time prior thereto had been, a large depositor in and a large borrower from the said Union National Bank; but that it is not true that the relations existing between said Charles E. Palmer and said George McBoyle on the 3rd day of January, 1907, were intimate or confidential; that it is not true that the said Charles E. Palmer relied on the statements of the said George McBoyle, or that all or any of the acts or repersentations of said George McBoyle were fraudulent or done with the intent to defraud or deceive the said Charles E. Palmer or the defendant bank as to the value of said stock, or that the said Charles E. Palmer relied on any of the statements made by said George McBoyle when he
23 agreed to accept the offer for said stock made by George McBoyle and when he purported to sell the said stock to said George McBoyle.

X.

Said Charles E. Palmer, the cashier of said defendant Union National Bank, without the authorization of said defendant Union National Bank, or its board of directors, or of any officer of said bank other than said Palmer, and beyond his power and the scope of his authority as cashier of said defendant Union National Bank, either expressed or implied, agreed to make said sale of said 599 shares of said stock to said George McBoyle upon the terms offered by said George McBoyle as aforesaid, and at the banking house aforesaid, and directed the note teller and assistant cashier of said bank

to accept the said sum of $1,500, and said promissory note of said George McBoyle for the further sum of $9,500, conditioned as aforesaid, in payment of said stock, the payment of said promissory note to be further secured, however, by the pledge to said bank of said certificate numbered 59, representing 599 shares of said stock, as collateral security for the payment of said note.

24

XI.

Upon the acceptance by said Charles E. Palmer, cashier of said defendant Union National Bank, of said offer of said George McBoyle, the said George McBoyle paid to the note teller and assistant cashier of said bank the said sum of $1,500 in cash and made and executed his promissory note, payable to said defendant Union National Bank on demand, for said sum of $9,500 with interest at the rate of six per cent per annum, and delivered the said promissory note to said note teller and cashier of said bank, and said certificate numbered 59 representing said 599 shares of said stock was accordingly retained in the possession of said bank, purporting to be collateral security for the payment of said note.

XII.

The powers of the said Charles E. Palmer as cashier of said Union National Bank, in so far as they are defined in the by-laws of said bank, are set forth in article VI of the by-laws of said bank as follows, to-wit:

"The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange and to issue certificates of deposit. He shall have general charge
25 and supervision, subject to the advice and control of the president and directors of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. He shall, at any meeting of the directors or stockholders make a full report embracing a general review of the transaction and business of the bank from the date of the last previous report, to the time of such meeting, and upon application furnish information pertaining to the business."

XIII.

Said purported sale of said 599 shares of said stock was made by said Charles E. Palmer, the cashier of said defendant Union National Bank without the consent or authorization of said defendant Union National Bank, or its board of directors, or of any officer of said bank other than the said Palmer, and was entirely and wholly beyond the powers of said cashier and beyond the scope of his authority as such cashier, either express or implied, or otherwise.

XIV.

That said defendant Union National Bank, when the fact
26 came to its knowledge and to the knowledge of its board of directors that said Charles E. Palmer as cashier of said defendant Union National Bank, had sold said 599 shares of said stock to said George McBoyle for the amount, and under the conditions, and in the manner hereinbefore stated, and within a reasonable time after said purported sale, and within a reasonable time after said bank and its said board of directors had received notice of said sale, and on the 19th day of January, 1907, by a resolution of the board of directors of said bank at a meeting of said board held on said last named day, repudiated, rescinded, vacated, set aside and annulled said purported and pretended sale, and repudiated and refused to accept or retain the payment of $1,500 made by the said George McBoyle to said bank, and repudiated and refused to accept or retain the promissory note of said George McBoyle hereinbefore mentioned, and ordered, directed, authorized and empowered the cashier of said bank, for and as the act of the Union National Bank to return, restore and deliver to the said George McBoyle said sum of $1,500, gold coin of the United States, with interest thereon at the legal rate from the 3rd day of January, 1907, to the date of the tender or delivery of said sum of $1,500 to the said George McBoyle, and to return, restore and de-
27 liver to said George McBoyle said promissory note, and to serve upon said George McBoyle a notice of the action of said bank and its board of directors as above stated, in relation to said purported and pretended sale; all for the reason, stated in said resolution, that said act of Charles E. Palmer, as cashier of said bank, in making said pretended sale of said stock to said George McBoyle was wholly unauthorized and wholly beyond the scope and power of the said Charles E. Palmer as such cashier. That thereupon the cashier of said defendant Union National Bank, on behalf of said bank and under its authorization and direction, did, on the 21st day of January, 1907, tender to said George McBoyle the said sum of $1,500 and the further sum of $28.50, the same being interest on said sum of $1,500 at the rate of seven per cent per annum from the said 3rd day of January, 1907, to the 21st day of January, 1907, said sums amounting in the aggregate to the sum of $1,528.50, in gold coin of the United States, and the said Promissory note of said George McBoyle for said further sum of $9,500; but that said George McBoyle did then and there refuse to accept said tender of $1,528.50, and said promissory note for $9,500, as aforesaid, and ever since has refused and does now refuse
28 to accept said tender, or said sum of $1,528.50, or said note; that immediately upon the refusal of said George McBoyle to accept said tender of said sum of $1,528.50 and said promissory note for $9,500, the said defendant Union National Bank on said 21st day of January, 1907, deposited the said sum of $1,500 in gold coin of the United States, and the further sum of $28.50 legal in-

terest on said sum of $1,500 from said 3rd day of January, 1907, to the 21st day of January, 1907, said sums amounting in the aggregate to said sum of $1,528.50, in the name of and subject to the order of said George McBoyle, in the Oakland Bank of Savings, which then and there was and now is a bank of deposit within this State, and of good repute, and also deposited said promissory note of said George McBoyle for said sum of $9,500 in said Oakland Bank of Savings, in the name of and subject to the order and demand of said George McBoyle; that notice of said deposit of said sum of $1,528.50 and of said promissory note of $9,500 in the name of and subject to the order of said George McBoyle, and that the same was at his disposal, was thereupon, to-wit, on the 22nd day of January, 1907, given to said George McBoyle by said defendant Union National Bank; that thereupon said George McBoyle
29 refused to accept said sum of $1,528.50 so deposited as aforesaid in his name and to his order in said Oakland Bank of Savings, or to receive back his said promissory note for $9,500, and at all times has refused, and does now refuse to accept or receive back the same, and that the said sum of $1,528.50 and said promissory note for $9,500 is now in said Oakland Bank of Savings, held by it subject to the said order of said George McBoyle, and to be paid and delivered to him on his demand; that none of the acts or representations of said George McBoyle were fraudulent or done with the intent to defraud or deceive the defendant Union National Bank as to the value of said stock, or otherwise.

XV.

That at none of the times mentioned in the amended complaint were plaintiffs, George McBoyle *or* Lulu May McBoyle, the owners, nor was either of them the owner of the said certificate numbered 59 representing 599 shares of said stock, nor on nor since the said 3rd day of January, 1907, have they or either of them been the owners or owner of said certificate of stock, nor are they or either of them now the owners or owner of said certificate of stock, or any part thereof.

30

XVI.

That on the 1st day of February, 1907, at the city of Oakland, state of California, the plaintiffs, and each of them, tendered and offered to pay to the said defendant Union National Bank, the said sum of $9,500, together with all interest then due thereon, and at the same time and place demanded delivery to them of the said certificate of stock so held by defendant Union National Bank and owned by it as aforesaid; said defendant Union National Bank then and there refused, and ever since has refused, and said defendants now refuse to accept the payment of said promissory note or to deliver to plaintiffs or either of them the said stock and certificate or either or any part thereof.

XVII.

That it is not true that on the 1st day of February, 1907, or at any other time, or ever or at all, the said defendant Union National Bank, at the city of Oakland, state of California, or elsewhere, converted said certificate and stock; that it is true that defendant Union National Bank at all times mentioned in the amended complaint was and ever since has been and now is the owner of said certificate and stock; that said defendant Union National
31 Bank at all times mentioned in the complaint up to the time it went into the hands of a receiver as hereinbefore found was in the actual possession of said certificate and stock; that ever since said defendant Union National Bank went into the hands of a receiver, as aforesaid, the said two receivers, during their respective terms of office have continuously been in the actual possession of said certificate and stock and that defendant H. N. Morris as such receiver now is in the actual possession of said certificate and stock, and that during all the times mentioned in the amended complaint up to the present time the possession of said stock has always been held by said defendant Union National Bank, or its said receiver.

XVIII.

That plaintiffs ever since the said 1st day of February, 1907, have been and now are ready, able and willing to pay said alleged indebtedness mentioned in the amended complaint to said defendant, and have offered and do now offer to pay the same upon the return of said stock and certificate.

Conclusions of Law.

And from the foregoing facts the court finds the following conclusions of law:

32 (1) That at none of the times mentioned in the amended complaint have the plaintiffs George McBoyle and Lulu May McBoyle been nor have they at any time since been nor are they now the owners of said certificate numbered 59 representing 599 shares of capital stock of the Burnham-Standeford Company, or any part thereof; that at none of the times mentioned in the amended complaint has either George McBoyle or Lulu May McBoyle been, nor has either of them at any time since been, nor is either of them now the owner of said certificate and said stock, or any part thereof.

(2) That at all the times mentioned in the amended complaint and continuously therefrom up to and at the present time the defendant Union National Bank has been and now is the owner of said certificate numbered 59 representing said 599 shares of said stock, and that during all the times mentioned in the amended complaint up to the present time the possession of said stock and the right of possession thereof has always been held by said defendant Union National Bank, or its receivers, and at the present time the

possession of said stock and the right of possession is held by defendant H. N. Morris as such receiver.

33 (3) That it was beyond his power and the scope of his authority, express or implied, as cashier of said Union National Bank for said Charles E. Palmer as such cashier to make said pretended sale of said certificate and stock to said George McBoyle without the consent or authorization of said defendant Union National Bank or its board of directors.

(4) That defendants are entitled to a judgment in their behalf and against plaintiffs, and each of them, that *all* all of the times mentioned in the amended complaint and continuously therefrom up to and at the present time the defendant, Union National Bank, has been and now is the owner of said certificate numbered 59, representing said 599 shares of said stock, and that during all the times mentioned in the amended complaint up to the present time the possession of said stock and the right of possession thereof always has been held by said defendant Union National Bank, or by its receivers, and that at the present time the possession of said stock and the right of possession is held by H. N.. Morris as such receiver; that plaintiffs are not the owners, nor is either of them the owner,

34 nor at any of the times mentioned in the amended complaint up to or at the present time have they been the owners, nor has either of them been the owner, or entitled to the possession of said certificate and stock; and that no return of said certificate and stock be made by defendants, or either of them, to plaintiffs, or either of them; that plaintiffs either jointly or severally take nothing by this action, and that defendants have judgment for their costs.

Let judgment be entered accordingly.

Dated—Oakland, Alameda county, California, this 17th day of November, 1909.

JOHN ELLSWORTH,
Judge of the Superior Court.

(Endorsed:) Filed Nov. 19, 1909. John P. Cook, County Clerk, by W. W. Crane, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

This cause came on regularly for trial on the 9th and 10th days of August, 1909, Messrs. T. C. Coogan, Powell & Dow, and Mr. W. H. Orrick appearing as counsel for the plaintiffs, and Mr. M. C.

Chapman, Mr. B. F. Woolner, Messrs. Fitzgerald & Abbott,

35 and Mr. Leon A. Clark appearing as counsel for the defendants. A trial by jury having been expressly waived by the respective parties hereto, the case was tried before the court without a jury. Evidence, both oral and documentary, was introduced on behalf of the respective parties and thereupon the cause was submitted to the court for its decision. And now the court being fully

advised in the premises and having fully considered said evidence, and, after due deliberation thereon, the court files its findings and decision in writing, and orders that judgment be entered in favor of the defendants in accordance herewith.

Therefore, by reason of the law and the findings and decisions aforesaid, it is hereby ordered, adjudged and decreed that on the 3rd day of January, 1907, and for a long time prior thereto, and continuously therefrom, up to and at the present time, and at all times mentioned in the amended complaint, the defendant Union National Bank has been, and now is, the owner of certificate numbered 59, representing 599 shares of the capital stock of the Burnham-Standeford Company, a corporation; and that on said 3rd day of January, 1907, and for a long time prior thereto, and con-
36 tinuously therefrom, and up to the present time, and at all times mentioned in the amended complaint, the possession of said certificate numbered 59, representing 599 shares of said stock, and the right of possession thereof, always has been held by said defendant Union National Bank or by its receivers, and that at the present time the possession of said stock, and the right of possession thereof, is held by said defendant H. N. Morris as such receiver; that plaintiffs are not the owners or entitled to the possession nor is either of them the owner or entitled to the possession, nor on the 3rd day of January, 1907, were they or either of them the owners or owner or entitled to the possession nor at any of the times mentioned in the amended complaint up to the present time have they been the owners or entitled to the possession, nor has either of them been the owner or entitled to the possession, of said certificate and stock, or any part thereof, and that no return of said certificate and stock be made by defendants or either of them to plaintiffs or either of them; that plaintiffs or either of them do not have or recover possession of the said certificate and stock or any part thereof; that plaintiffs, either jointly or severally, take nothing by this action; and that the defendants do have and recover from the plain-
37 tiffs herein their costs and disbursements incurred in this action amounting to the sum of $16.00.

Judgment entered this 19th day of Nov., 1909.

JOHN P. COOK, *Clerk*,
By W. W. CRANE,
Deputy Clerk.

(Endorsed:) Entered Nov. 19, 1909. John P. Cook, County Clerk, by W. B. Smith, Deputy Clerk. Record book 76; page 417. D. 11, 19, '09.

[Title of Court and Cause.]

Clerk's Certificate to Judgment Roll.

I, John P. Cook, county clerk of the county of Alameda, state of California, and ex-officio clerk of the Superior Court, in and for said county, do hereby certify the foregoing to be a true copy of the judgment entered in the above entitled action, and recorded in

judgment book 76 of said court, at page 417. And I further certify that the foregoing papers, hereto annexed, constitute the judgment roll in said action.

38 Witness my hand and the seal of the said Superior Court, this 19th day of Nov., A. D. 1909.

[SEAL.]

JOHN P. COOK, *Clerk*,
By W. W. CRANE,
Deputy Clerk.

(Endorsed:) Filed Nov. 19, 1909. John P. Cook, Clerk, by W. W. Crane, Deputy Clerk. D. 11, 19, '09, 76-417.

[Title of Court and Cause.]

Notice of Appeal from Judgment.

To the above named defendants and their attorneys herein, Messrs. Fitzgerald and Abbott and Leon A. Clark:

Notice is hereby given that the plaintiffs above named hereby appeal to the Supreme Court of the state of California from the judgment (and from the whole thereof) given and made in favor of defendants by said Superior Court in the above entitled

39 cause and which judgment was entered herein on the 19th day of November, 1909.

Dated this 11th day of December, 1909.

T. C. COOGAN,
W. H. ORRICK,
POWELL & POW,
Attorneys for Plaintiffs.

(Endorsed:) Due service of the within admitted this 11th day of December, 1909. Leon A. Clark, Fitzgerald & Abbott, Attorneys for Defendants. Filed Dec. 11, 1909. John P. Cook, Clerk, by W. E. Adams, Deputy Clerk.

[Title of Court and Cause.]

Notice of Appeal.

To the above-named defendants and to each of them and to their and each of their attorneys, Messrs. Fitzgerald & Abbott and Leon Clark, Esquire:

Notice is hereby given that the plaintiffs above-named hereby appeal to the Supreme Court of the State of California from

40 the order of the above-named Superior Court denying said plaintiffs' motion for a new trial of said cause, made and entered upon the minutes of said Court on the 28th day of May, 1910.

Dated June 8th, 1910.

T. C. COOGAN,
W. H. ORRICK,
POWELL & DOW,
Attorneys for Plaintiffs.

(Endorsed:) Service of within is hereby acknowledged this 9th day of June, 1910. Fitzgerald & Abbott, Leon A. Clark, Attorneys for Defendants. Filed June 9th, 1910. John P. Cook, Clerk, by W. W. Crane, Deputy Clerk.

[Title of Court and Cause.]

On Appeal from the Superior Court in and for the County of Alameda.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all
41 and singular the law and the premises having been fully considered, the opinion of the court herein is delivered by The Court.

Whereupon, it is ordered, adjudged and decreed by the Court that the Judgment and Order of the Superior Court in and for the County of Alameda in the above entitled cause, be and the same are hereby reversed, Appellant to recover costs of appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 2nd day of March, 1912, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 2nd day of April, A. D. 1912.

[SEAL.] B. GRANT TAYLOR, *Clerk*,
By A. ERB, *Deputy*.

(Endorsed:) Remittitur. Filed April 3, 1912. John P. Cook, Clerk, by W. W. Crane, Deputy Clerk. Entered in Minute
42 Book No. 30, Dept. No. 3, on page 596, May 18, 1912.

[Title of Court and Cause.]

Amended Answer of Defendants.

Now come the defendants in the above entitled action and by leave of Court file this their amended answer to the amended complaint of plaintiffs on file herein and deny and aver as follows:

I.

Admits the allegations of paragraphs I, II, III and IV of said amended complaint.

II.

Denies that on or about the 3rd day of January, 1907, or at any other time, or at the city of Oakland, California, or elsewhere, or at all, the plaintiff Lulu May McBoyle was in possession of or

owned that certain certificate No. 59, representing 559 shares, or any number of shares, or any certificate representing any number of shares of the capital stock of the said Burnham-Standeford Company, or that she then or there, or elsewhere or at all, de-
43 livered the possession of said certificate to or pledged said 559 shares or any number of shares with the defendant as security for the payment of a certain promissory note, or any promissory note for $9,500 and interest, executed by plaintiff George McBoyle, or dated on or about the 3rd day of January, 1907, or payable on demand, or for any other purpose or at all. Denies that defendant then or there received said 599 shares or took possession of said certificates as such pledge.

And in connection with the foregoing denial the defendant avers:

That it, the Union National Bank, was on the 3rd day of January, 1907, and for a long time prior thereto, the owner of and in possession of that certain certificate No. 59, representing 599 shares of the capital stock of the said Burnham-Standeford Company. That Charles E. Palmer was on said 3rd day of January, 1907, and for a long time prior thereto had been the cashier of said defendant bank. That on said 3rd day of January, 1907, and for a long time prior thereto, plaintiff George McBoyle was president and a large stockholder of said company, and directed, controlled and managed the business of said Burnham-Standeford Company, and
44 as such president and manager well knew and was familiar with the value of the stock of said company; That at said time said cashier was not familiar with nor did he know the value of said stock.

That on or about the said 3rd day of January, 1907, the said George McBoyle applied to the cashier of the defendant, Charles E. Palmer, and asked to purchase said stock. That said cashier then and there attempted to make the sale of said stock to said George McBoyle for One Thousand and Five Hundred Dollars ($1,500) in cash and the promissory note of said George McBoyle for the further sum of $9,500; That the said cashier, Charles E. Palmer, in attempting to make said sale to the said George McBoyle acted beyond his power and authority as cashier of the defendant bank and without the consent or authorization of the defendant bank or its Board of Directors; That said cashier had no power or authority to sell said stock under the terms and provisions of the "National Bank Act" or under any of the acts of Congress or under any provision of law, or otherwise or at all. That the said defendant bank immediately and as soon as the facts became known to its Board of Directors and on or about the 4th day of January, 1907, notified the said McBoyle that the said cashier was with-
45 out any authority to sell said stock and immediately tendered to said McBoyle at his place of business said note and $1,500 in cash, with interest at 7% per annum, up to the date of tender, both and all of which the said McBoyle refused to accept and immediately upon said refusal the defendant bank placed the said note and the said sum of $1,500 and interest thereon as aforesaid, in the Oakland Bank of Savings which then and there was

and now is a bank of deposit within this State and of good repute, subject to the order of said George McBoyle and so notified the said George McBoyle.

III.

Further answering, the defendant avers on its information and belief that the said George McBoyle was the real party in interest, and the allegation that Lulu May McBoyle is now the owner of said stock is a subterfuge and is in fact untrue.

IV.

Denies that on the first day of February, 1907, or at the city of Oakland, California, or any other place, or ever or at all the plaintiffs, or either of them, tendered or offered to pay the said
46 defendant the sum of nine thousand five hundred ($9,500) dollars, together with interest then due thereon, or any other sum whatever, or at the same time demanded the delivery to them of said certificate of stock so held by it as security as aforesaid in said amended complaint.

V.

Admits that the said defendant refused and does now refuse to accept payment of said promissory note or to deliver to plaintiffs, or either of them, the said stock and said certificate, or either or any part thereof;

VI.

Denies that said certificate was ever converted or the stock or any portion thereof ever was converted, and in this behalf denies that the said bank, the defendant herein ever parted with the possession or the ownership of said stock, and admits that it now has the same in its possession;

VII.

Alleges that defendant has no information or belief on the subject sufficient to enable it to answer the allegation that the plaintiffs since the first day of February, 1907, or ever or at all,
47 have been or now are ready, able or willing to pay said pretended indebtedness to said defendant, and placing its denial on that ground denies the same;

Wherefore, the defendant prays judgment that the plaintiffs take nothing by their action, and for costs of suit.

FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Defendants.

STATE OF CALIFORNIA,
County of Alameda, ss:

H. N. Morris, being duly sworn, deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing Amended Answer and knows the contents thereof; and that the same is true of his own knowledge except as — the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

H. N. MORRIS.

Subscribed and sworn to before me, this 13th day of January, 1913.

[SEAL.] CHARLES A. BEARDSLEY,
Notary Public in and for the County of Alameda, State of California.

48 [Endorsed:] Service of within Amended Answer admitted by copy this 13th day of January, 1913. T. C. Coogan, Powell & Dow, W. H. Orrick, Attorneys for Plaintiffs. Filed Jan. 13, 1913. John P. Cook, County Clerk, by Geo. H. Stricker, Deputy Clerk.

[Title of Court and Cause.]

Decision.

The judgment of the Supreme Court of the State of California reversing the judgment entered herein on the 19th day of November, A. D. 1909, in favor of the defendants in said action and against the plaintiffs therein having been duly certified and filed herein, the said cause thereafter, to-wit: on the 13th day of January, A. D. 1913, came on regularly for trial before the Court, sitting without a jury, a trial by jury having been waived by the parties, Messrs. T. C. Coogan, Powell & Dow and W. H. Orrick appearing as counsel for plaintiffs, and Messrs. Fitzgerald & Abbott appearing for defendant Union National Bank and also for defendant H. N.
49 Morris, as receiver of said Union National Bank, who, by consent of counsel for plaintiffs and for defendant, Union National Bank and himself, by order of said Court therefore duly given and made, was joined as a party defendant in said action with said defendant Union National Bank.

It is stipulated that the cause might be submitted upon the evidence taken at the first trial thereof, and that the witness George Schammel, if called as a witness on said second trial, in addition to the testimony given by him at said first trial would have testified that the stock hereinafter mentioned, at all times after its purchase by said defendant, Union National Bank, was carried on its books in the bond investment account.

And the cause having been submitted to the Court for its decision, the Court being fully advised in the premises, makes the following findings of fact and conclusions of law, to-wit:

Findings of Fact.

I.

That the defendant Union National Bank of Oakland is, and at all times mentioned in the amended complaint in said
50 action was, a corporation organized and existing under and by virtue of an act of Congress of the United States, and during all of the times mentioned in said amended complaint, and up to the time of the commencement of this action, was engaged in carrying on the business of a national bank in the City of Oakland, County of Alameda, State of California.

II.

That on or about the 14th day of April, 1909, after proceedings duly taken for that purpose in accordance with the national banking laws, the comptroller of currency duly appointed Edwin F. Rorebeck receiver of defendant Union National Bank; and thereupon said Edwin F. Rorebeck duly qualified as such receiver in accordance with said order of appointment of said comptroller of currency, and that at all times thereafter and until the 14th day of May, 1909, he continued to be the duly appointed, qualified and acting receiver of said defendant bank; that on the 14th day of May, 1909, said Edwin F. Rorebeck, under and in pursuance of an order of the comptroller of currency, resigned and ceased to be such receiver, and defendant H. N. Morris, was, on the 14th day of May, 1909, by the said comptroller of currency, duly appointed receiver of
51 said bank in the place and stead of said Edwin F. Rorebeck, that thereafter, to-wit: on the 14th day of May, 1909, said defendant H. N. Morris duly qualified as such receiver, in accordance with said order of appointment of said comptroller of currency, and that he ever since has been, and now is, the duly appointed, qualified and acting receiver of said defendant bank, and ever since last-mentioned day has been in possession of the books, records and assets of every description of said defendant bank, and is now collecting all debts, dues and claims belonging to said bank.

III.

That at all times mentioned in the amended complaint, and at the commencement of this action, Burnham-Standeford Company was a corporation organized and existing under and by virtue of the laws of the State of California, for the purpose of conducting a planing mill business therein, and during the times mentioned in said amended complaint, and at the commencement of this action, was carrying on such business in the City of Oakland, in said County of Alameda.

IV.

That plaintiffs, George McBoyle and Lulu May McBoyle,
52 at all times mentioned in the amended complaint, and at the commencement of said action, were and now are husband and wife.

V.

That at all times mentioned in the amended complaint the capital stock of said Burnham-Standeford Company was, and now is, divided into 2,400 shares of the par value of $50 each; that at all of said times 1803 shares of said stock were and are now issued.

VI.

That on the 3rd day of January, A. D. 1907, and for a long time prior to the time of the sale hereinafter mentioned, defendant Union National Bank was the owner and in possession of certificate No. 59 representing 599 shares of the capital stock of said Burnham-Standeford Company, and was carried on its books in the bond investment account, and that Charles E. Palmer on said 3rd day of January, 1907, was and for a long time prior thereto had been the cashier of said defendant bank. That on said 3rd day of January, 1907, plaintiff George McBoyle was and for a long time prior thereto had been president and a large stockholder of said Burnham-
53 Standeford Company, and directed, controlled and managed the business thereof. But it is not true that as such president and manager, or otherwise, said plaintiff George McBoyle knew or was familiar with the value of the stock of said Company, nor is it true that said Charles E. Palmer on said 3rd day of January, A. D. 1907, knew or was familiar with the value of the stock of said company; and that at all of said times said stock had no market value, and the actual value thereof was unknown and uncertain, but said stock was at all times of a greater value than $10,000.

VII.

That on, to-wit: the 2nd day of January, A. D. 1907, at the banking house of said defendant bank in said City of Oakland, Plaintiff, George McBoyle, applied to said cashier, Charles E. Palmer, and asked to purchase said 599 shares of the capital stock of said Burnham-Standeford Company represented by said certificate No. 59; that said cashier, acting for said defendant bank, on said day sold said shares to plaintiff George McBoyle for the sum of $11,000. That said cashier, Charles E. Palmer, in making said sale did not act beyond his power of authority as cashier of said defendant bank or without the consent or authorization of said
54 defendant bank; but it is true that in making said sale said Palmer did not act upon previous authority given by the Board of Directors of said defendant bank. That it is not true that said cashier had no power or authority to sell said stock under the

terms and provisions of the "National Bank Act," or under any of the acts of Congress or under any provision of law; but the said Charles E. Palmer, as such cashier, at all of said times possessed full power and authority to make such sale on behalf of said defendant bank, and said sale was a valid act of said defendant bank and was and is binding upon it.

VIII.

That on the 3rd day of January, A. D. 1907, at the banking house of said defendant bank, the assistant cashier of said defendant bank, pursuant to the direction of said cashier, delivered the said stock and certificate, duly endorsed, to said purchaser, and that at that time and as part of the same transaction, plaintiff, George McBoyle, paid said defendant bank the sum of $1,500 in cash on account of the purchase of said stock and certificate, and executed and delivered to said defendant bank his promissory note for $9,500
55 and interest dated said 3rd day of January, 1907, payable on demand; that plaintiff George McBoyle (but not plaintiff Lulu May McBoyle), then and there received and had possession of said stock and certificates, while said note was being prepared for execution; and immediately thereafter returned the possession of said certificate to, and pledged said 599 shares with, said defendant bank as security for the payment of said promissory note, and said defendant bank then and there received said 599 shares and took possession of such certificate as collateral security for said note.

IX.

It is true that on the 19th day of January, 1907, at a special meeting of the Board of Directors of said defendant bank, said Board of Directors adopted a resolution purporting to repudiate and rescind said sale, and on the 21st day of January, A. D. 1907, said Board of Directors caused to be delivered to plaintiff George McBoyle, a written notice thereof, and thereupon tendered to him at his place of business said promissory note and $1,500 in cash, with interest at the rate of 7 per cent. per annum up to the date of tender. It is also true that said George McBoyle refused to accept said
56 promissory note and money or any part thereof; that on said 21st day of January, 1907, said defendant bank placed said promissory note and said sum of $1,500 and interest thereon as aforesaid in the Oakland Bank of Savings, which then and there was and now is a bank of deposit within the State, and of good repute, subject to the order of said plaintiff George McBoyle, and so notified him on the 22nd day of January, 1907. That it is true that said George McBoyle was the real party in interest in the premises.

X.

That on the 1st day of February, A. D. 1907, at said City of Oakland, plaintiffs and each of them, tendered and offered to pay

to said defendant bank the sum of $9,500.00, together with all interest due upon said promissory note, and at the same time demanded the delivery of said certificate of stock so held by said defendant bank as security as aforesaid. That said defendant bank then and there refused and ever since has refused and now refuses to accept payment of said promissory note or to deliver to plaintiffs, or either of them, the said stock and certificates, or either or any part thereof, and then and there retained said certificates and stock; that
57 said receiver is now in the possession thereof. Plaintiffs and each of them ever since said 1st day of February, 1907, have been and now are ready, able and willing to pay said indebtedness to defendants.

Conclusions of Law.

And from the foregoing facts the Court finds the following Conclusions of Law: That plaintiff George McBoyle was on the 3rd day of January, A. D. 1907, and ever since has been and now is the owner of said 599 shares of the capital stock of said Burnham-Standeford Company, a corporation, and of certificate No. 59 representing said shares; and that on said 3rd day of January, A. D. 1907, and while said plaintiff was the owner of said stock and certificate, the same were by him pledged with defendant Union National Bank to secure the payment of the principal and interest of a certain promissory note dated said 3rd day of January, A. D. 1907, executed by him to said defendant Union National Bank for the sum of $9,500, with interest thereon from said date to the said 1st day of February, 1907, at the rate of seven per cent per annum, and payable on demand; and that upon payment by said
58 plaintiff to said defendant H. N. Morris, as receiver of defendant Union National Bank, or his successor, of the said sum of ninety-five hundred ($9,500) dollars, together with interest thereon at the rate of seven per cent. per annum from the 3rd day of January, A. D. 1907, to the said 1st day of February, 1907, said plaintiff is entitled to have and recover said stock and certificate from said defendants.

Let judgment be entered accordingly.

Dated, this 26th day of June, A. D. 1913.

WM. S. WELLS,
Judge of the Superior Court.

[Endorsed:] Service of a copy of the within is hereby acknowledged this 19th day of June, A. D. 1913. Fitzgerald & Abbott, Attorneys for Defendants. Filed Nov. 3, 1913. John P. Cook, County Clerk, by W. E. Adams, Deputy Clerk.

[Title of Court and Cause.]

Judgment.

This cause came on regularly for trial on the 13th day of January, A. D. 1913, Messrs. T. C. Coogan, Powell & Dow and

59 W. H. Orrick appearing for plaintiffs, and Messrs. Fitzgerald & Abbott appearing for defendants. A trial by jury having been expressly waived by the parties, the cause was tried before the Court sitting without a jury. Evidence, both oral and documentary, was introduced on behalf of the respective parties, and thereupon the cause was submitted to the Court for its decision. And now the Court, being fully advised in the premises and having fully considered said evidence, and its decision in writing having been filed herein:

It is hereby ordered, adjudged and decreed that on the 3rd day of January, A. D. 1907, plaintiff Lulu May McBoyle was and she ever since has been and now is, the owner of the 599 shares of the capital stock of Burnham-Standeford Company, a corporation referred to in the amended complaint in said action, and of certificate No. 59 representing said shares; and that said stock and certificate were, on said 3rd day of January, A. D. 1907, pledged by plaintiff Lulu May McBoyle with defendant Union National Bank, to secure the payment of the principal and interest of a certain promissory note dated said 3rd day of January, A. D. 1907, executed by plaintiff George McBoyle to said defendant Union National Bank for the sum of $9,500, with interest thereon from the
60 date thereof, at the rate of seven per cent. per annum, and payable on demand.

It is further ordered, adjudged and decreed that upon payment by plaintiff Lulu May McBoyle to defendant H. N. Morris, as receiver of said defendant Union National Bank, or his successor of the sum of $9,500.00, together with interest thereon at the rate of seven per cent. per annum from the 3rd day of January, A. D. 1907, said plaintiff Lulu May McBoyle have and recover said stock and certificate of said defendants.

It is further ordered and adjudged and decreed plaintiffs have and recover their costs herein, taxed at the sum of $—.

WM. S. WELLS,
Judge of the Superior Court.

(Endorsed:) Filed Nov. 3, 1913. John P. Cook, County Clerk, by W. E. Adams, Deputy Clerk. Entered Nov. 6th, 1913, Judgment Record No. 98, P. 249. John P. Cook, County Clerk, by J. O. Gustafson, Deputy Clerk.

61 [Title of Court and Cause.]

Clerk's Certificate of Judgment Roll.

I, John P. Cook, County Clerk of the County of Alameda, State of California, and ex-officio Clerk of the Superior Court, in and for said county, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book 98 of said Court at page 249. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the Seal of said Superior Court, this 6th day of Nov., A. D. 1913.

[SEAL.] JOHN P. COOK, *Clerk*,
By W. W. CRANE, *Deputy Clerk*.

(Endorsed:) Filed Nov. 6, 1913. John P. Cook, Clerk, by W. W. Crane, Deputy Clerk.

62 [Title of Court and Cause.]

Engrossed Bill of Exceptions.

To Be Used on Appeal from the Judgment.

The above entitled cause came on regularly for trial on the 13th day of January, 1913, before the above entitled court, sitting without a jury, a trial by jury having been expressly waived in open Court, the plaintiff appearing by T. C. Coogan, Esq., William H. Orrick, Esq., and Messrs. Powell and Dow, and the defendants appearing by Messrs. Fitzgerald, Abbott & Beardsley, and Leon A. Clark, Esq., whereupon the following proceedings were had:

The respective parties introduced evidence, both oral and documentary, which evidence was sufficient to establish and sustain, and which evidence did establish and sustain, the truth of paragraphs I, II, III, IV, V, VI, VIII, IX, X and the following portions of paragraph VII of said findings, to-wit: "That on, to-wit, the 2nd day of January, A. D. 1907, at the banking house of said defendant bank in the City of Oakland, plaintiff, George McBoyle applied to said cashier, Charles E. Palmer, and asked to purchase said 599
63 shares of the capital stock of said Burnham-Standeford Company, represented by said certificate No. 59, * * * But it is true that in making said sale said Palmer did not act upon previous authority given by the Board of Directors of said Bank."

That the only evidence introduced or considered by the Court tending to justify or sustain the remainder of said paragraph VII of said findings to-wit: "That the said cashier acting for said defendant bank on said day sold said shares to plaintiff George McBoyle for the sum of Eleven Thousand Dollars ($11,000). That said cashier, Charles E. Palmer, in making said sale did not act beyond his power of authority as cashier of said defendant bank or without the consent or authorization of said defendant bank; * * * That it is not true that said cashier had no power or authority to sell said stock under the terms and provisions of the 'National Bank Act' or under any of the acts of Congress or under any provision of law; but said Charles E. Palmer as such cashier at all of said times possessed full power and authority to make such sale on behalf of said defendant bank and said sale was a valid act of said
64 defendant bank and was and is binding upon it," is hereinafter in this bill of exceptions contained.

GEORGE McBOYLE was sworn as a witness on behalf of plaintiffs and testified as follows:

Direct examination.

To Mr. Coogan:

I am one of the plaintiffs in this case, I have resided in Oakland continuously for the last 14 years.

Mr. Coogan:

Q. (Showing the witness a paper hereinafter designated "Plaintiff's exhibit A.") I hand you a promissory note and ask you if that is your signature to the promissory note?

A. That is my signature, yes sir.

Q. And is that your signature at the end of the note?

A. It is.

The Court: It appears in two places, then, on that document?

A. Yes sir.

The Witness (cont.): It was signed by me in both places on January 3, 1907. Right after I signed it I handed it to Mr. George Schammel, assistant cashier and note-teller of the Union National Bank.

65 That took place at the Union National Bank, 12th and Broadway, Oakland. At the time I delivered the promissory note to Mr. Schammel, I handed him certificate 59, for 599 shares of the capital stock of the Burnham-Standeford Company.

Mr. Coogan: I now offer in evidence this promissory note.

The Court: It may be deemed read in evidence and marked

"PLAINTIFFS' EXHIBIT A."

Said promissory note was and is in the words and figures following, to-wit:

$9,500. OAKLAND, CAL., January 3, 1907.

On demand after date, without grace, I promise to pay to the order of C. E. Palmer, Cashier, at The Union National Bank, of Oakland, Cal., the sum of Nine thousand five hundred Dollars, payable in United States Gold Coin, (present standard) with interest thereon in like Gold Coin from date until paid, at the rate of 6 per cent. per annum payable quarterly and if not so paid, to compound and become a part of the principal and bear interest thereafter at the same rate for value received.

(Signed) G. W. McBOYLE.

66 And as collateral security for the payment of the above note, and the interest to grow due thereon, I have deposited with the Union National Bank, of Oakland, Cal., the following property, to-wit: 599 shares of stock of Burnham-Standeford Co. in certificate No. 59.

And should the said note, or any part thereof, or the interest to grow due thereon remain due and unpaid after the same should have been paid according to the tenor of said note, I hereby irrevocably authorize and empower said Union National Bank, of Oakland, or its assigns, to sell and dispose of the above described property, or any part thereof, at public or private sale, with or without previous notice to me of any such sale, and from the proceeds arising therefrom to pay the principal, interest, charges and cost of such sale, and the balance, if any, to pay over to me or any representatives upon demand. In case of any deterioration of any of the above securities, or fall in the market value of the same, I hereby promise and agree to reduce the amount of said note, or to increase the security in proportion to such deterioration or decrease of value in default of which, this note shall be considered due under the above stipulations. On the payment of the above note, in-
67 terest and charges, according to the terms thereof, this agreement shall be void, and the above described securities returned to me.

(Signed) G. W. McBOYLE.

Indorsed on back: Without recourse. C. E. Palmer, Cashier.

Cross-examination.

Mr. Fitzgerald:

Q. Mr. McBoyle, where did you get the certificate you say you handed to Mr. Schammel when you made the note?

A. My wife purchased it from the United National Bank, I got it from Mr. Schammel.

Mr. Fitzgerald:

Q. When did he hand it to you?

A. At the time he made out the note.

Mr. Fitzgerald:

Q. How did he come to hand it to you?

A. I asked him for it.

Q. Why did you ask him for it?

A. I wanted the stock.

Witness (continuing): I asked him for it. I took it into my possession.

Mr. Fitzgerald:

Q. How did you come to ask for it from Mr. Schammel?
68 A. Mr. Palmer told me Mr. Schammel had it in his possession.

Witness (continuing): Mr. Palmer was cashier of the Union National Bank.

Q. Immediately prior to that time, did you have in possession, or did you have ownership of, this certificate?

A. Prior to what time?

Mr. Fitzgerald:

Q. The time that you asked Mr. Schammel to let you have it?

A. No, I never had any possession of it before then, either personally or as president of the Burnham-Standeford Company. Nor as representing my wife.

Mr. Fitzgerald:

Q. Under what circumstances did Mr. Schammel—just relate the conversation and everything—hand you this certificate?

A. I was sent by Mr. Palmer to pay Mr. Schammel some money, pay him $1,500.

Q. How did Mr. Palmer come to send you to pay Mr. Schammel $1,500.

A. I offered money to Mr. Palmer. Mr. Palmer said "Take your money to Mr. Schammel."

69 The Witness (continuing): I offered him the money in payment of the stock. Mr. Palmer told me to take the money to Schammel. Schammel had my stock. I gave the money to Mr. Schammel. After I had given him the money, after he had counted the money, I asked him for my stock. I said, "Mr. Schammel" asked him where my stock was; I wanted my stock. He turned around to the shelf behind him, had it in a little paper receptacle where he kept stocks and notes. He pulled it out and looked at it, and said "Certificate 59, 599 shares", and handed me the stock; went on making my note. After he had finished making the note, I still retained the stock in my possession. After he had finished making out the note, he handed me the note and said "sign here and sign here." I read the note, and after having read the conditions of the note I signed the note, and passed the note back to him with that certificate of stock. After I had delivered him the stock, I said to Mr. Schammel, "Mr. Schammel, don't I get a receipt for that to show what has become of the stock?" He said "No," he says "it is not customary to do that." I said, "I am going up to Eureka tomorrow, an accident might happen, and I may not get back; what will I have to show what has become of this stock?" "Well," he

70 said, "I'll tell you what I'll do; I'll give you a copy of the note." I told him that was all satisfactory. He made out a copy of the note and handed it to me to sign my name as he did with the original. I said, 'No, you sign it and it will be all in your handwriting. He did so. I took the copy. He signed it all in his handwriting. He marked "Copy" across the face of it. He handed it to me. I started out of the bank. As I was going out I said, "Mr. Palmer, the deed is done." He said, "Well, good-bye and good luck." I went over to the Oakland Bank of Savings to my safe deposit box and deposited the certificate with the copy of the note.

Mr. Fitzgerald:

Q. So that when you had paid $1,500 and before you had given the bank any other evidence of indebtedness or any other money the cashier handed you this certificate as yours; was it your understanding that you then owned it?

A. It was.

The Witness (continuing): I had the certificate both before and after I signed the note. She paid $1,500 and was to pay the balance of it. The bank handed the certificate to me in my hand after depositing the $1,500.

The Court: Oh, I think I understand it thoroughly. I
71 will state how I understand it, and if I am wrong the witness may correct me. If there is no objection, I will state my understanding of the testimony: That he handed to Mr. Schammel $1,500 and asked for the stock. Thereupon Mr. Schammel handed to him this certificate. At the time the note had not been written, or completed at least; the writing of it had not been completed, and it had not been signed by the witness, neither the note nor the other part of that document, "Exhibit A," or the paper of which "Exhibit A," is a copy. That is my understanding of this testimony.

Mr. Fitzgerald: That is mine.

Mr. Coogan: That is what Mr. McBoyle said.

The Court: We don't need to spend any more time on it then. One word more. How soon after you handed this $1,500 to Mr. Schammel was it that you gave him the paper of which "Exhibit A" is a copy?

A. Almost immediately. It took him about five or ten minutes to write a note.

Mr. Fitzgerald:

Q. At the time that you spoke with Mr. Palmer, cashier of the bank, about this stock, what, if anything was said as to what
72 you were to pay for it? State what it was.

A. To Mr. Schammel, you mean?

Q. Mr. Palmer.

The Court: Mr. Fitzgerald, your question has reference to the interview, or does it have reference to the interview, on the day upon which this $1,500 was paid?

Mr. Fitzgerald: Yes sir, this question is aimed at that.

A. $11,000. That was on the same day the note was made.

The Witness (continuing): This note was signed by me personally. The stock belonged to my wife. She didn't have the stock in her possession only through me. I had authority from her to pledge the certificate. I had her own instructions. She agreed to it. At the time I spoke with Mr. Palmer about purchasing the stock, I said nothing concerning its value. I was president of the Burnham-Standeford Company. I knew as much as anybody did, about its value.

Mr. Fitzgerald:

Q. Had you conversations with him the day before?

A. Yes, sir.

73 Q. What was said with reference to the purchase of the property at that time by you?

A. I went to the bank at half past 3, between half past 3 and 4 o'clock in the afternoon, of the 2nd, to see Mr. Palmer regarding our overdraft the Burnham-Standeford Company had at the bank.

The Witness (continuing): I was talking to Mr. Palmer about

the notes. He said the Bank Commissioners had called our loan an excessive loan, and told me how he wanted it fixed. We owed $32,500. He said, "You let $2,500 of that remain in the Burnham-Standeford's notes, but the other $7,500 must be put in the Burnham-Standeford Company corporation note, and endorsed by yourself and Mr. Hundley." I said, "What is the matter with the loan, Mr. Palmer, don't you consider it good?" He said, "Oh, yes, it is good enough, but, when the commissioners have called it an excessive loan, and you must put it in a different shape." I said, "All right, we will do that." He said, "Besides, you know the bank already owns a block of stock in the Burnham-Standeford Company and the National Bank Examiners have severely criticised us for retaining it so long." I says, "Mr. Palmer, the stock is all right."
74 He said, "Well, it may be, but we should have disposed of it long ago. "I said, "Do you want to sell it?" He said, "Do you want to buy it?" I said, "No, I haven't the money to buy it; my wife has some money and some property. If you want to sell that stock and you give us time to realize on the security, and I can come to terms, she will buy the stock." I said, "Do you want to sell it?" He said, "Well, I don't know but we would." I said, "What do you hold it at? What do you want for it?" He said, "Well, I will see." He went in to Mr. Schammel's office at the other end of the bank. We were sitting at the front of the bank, near the door: went into Schammel's office, came back in a few minutes, and said "That represents $10,500 on our books." "Well," said I, "Mr. Palmer, $10,500?" He said, "Yes." "Well, I will tell you what I will do, Mr. Palmer; my wife has $1,500 in money in the bank over here; she holds our corporation's Burnham-Standeford corporation's note for $5,500. That makes $7,000. She owns a third interest in the property at the corner of 8th and Market. I will make you an offer on that; she will give you $10,500 for that, pay you $1,500 down; I don't want to cash the Burnham-Standeford notes right now because we need it in our business, but I will give you my note for $9,500 and pay you $10,500 for your stock, until such time
75 as I can afford to take that money out of the business and sell her property." I said "I want a year at least at 6%." "Oh," he says, "if I sell it to you for $10,500, I have got nothing for interest." "Well," says I, "give $500 more for interest, make the same proposition $11,000, and subject to the same considerations." He said, "Well, that is a fair offer, and you will deposit the stock as additional security?" I said, "Yes." "Well," he said, "that is a fair offer; that's a fair offer; I will take the matter up with Mr. J. Dalzell Brown, and if Mr. Brown says to sell the stock, you can have it." That was on the 2nd of January, 1907. I think that was about the end of the conversation. Just at that time Mr. Crane came by where we were sitting, and he spoke to him, shook hands with him, and said "Your account is all right," and as he passed by Mr. Palmer said "Mr. Crane is to be cashier and I am to be president." Just at this time Mr. Crane called me and introduced me to Mr. de Fremery, one of the bank directors, and then at the time I went down to the mill. Prior to that date I had no conversation with Mr. Palmer about the sale of this stock. I heard from Mr. Palmer on

the evening of the 2nd by telephone. He called me up at the
76 mill at half past, about quarter past 5 in the evening, and he said "you Mr. McBoyle?" I said "Yes." Mr. Palmer said "I want to tell you that I have seen Mr. Brown, and he says to sell the stock; come up in the morning and make the arrangement. The stock is yours." That is all the conversation on the 3rd. On the following morning I went to the bank. I believe on the 2nd Palmer asked me if it paid dividends. I told him "No, it didn't pay dividends, wouldn't till such a time as I had money enough in hand so I wouldn't be compelled to go to the bank and explain matters." That is the only conversation I had regarding the stock in any way. Now, the next conversation had with him was on the 3rd. I went up to the bank about, I think it was 10 o'clock A. M. In the first conversation that I had with Mr. Palmer concerning the sale of the stock, I told him that I would give him $1,500 and leave the stock as security for the balance of the purchase price, $9,500, and he said he would take the matter up with Mr. Brown. I had a conversation with Palmer on the 2nd about half past 3 or 4 o'clock in the afternoon. My intention in going to the bank was to see about our overdraft.

Counsel for defendants thereupon offered and the court received in evidence said certificate No. 59. Said certificate was marked

77 "DEFENDANTS' EXHIBIT I,"

and was and is in the words and figures following, to-wit:

"Burnham-Standeford Company.

Capital Stock, $120,000.00; 599 Shares; 2,400 Shares at $50 Each.

OAKLAND, January 20, 1905.

This certifies that William H. High, trustee, is entitled to 599 shares of the capital stock of the Burnham-Standeford Company, transferable on the books of the company, subject to the provisions of the by-laws, by endorsement hereon and surrender of this certificate.

E. R. HUNDLEY, *Secretary.*
GEORGE McBOYLE, *President.*"

(Endorsed on the back:) "W. H. High, Jr., trustee."

It was *was* thereupon stipulated by counsel for the respective parties that Mr. High, as trustee, held the certificate as trustee for the bank; that his holding was merely nominal; that Mr. High at the time of the trial was not connected with the Union National Bank; and that the certificate remained in the bank all the time.

The Witness (continuing): I was as familiar as anybody
78 could be with the value of that stock at the time I purchased it. Its value was about $11,000. It had no market value, no ready sale. It was a matter of conjecture what it was worth.

Mr. Fitzgerald:

Q. Is that the reason your answer is, it is worth $11,000?
A. Yes, sir.
Q. Conjecture?
A. Yes, sir.

Witness (continuing): As president of the Burnham-Standeford Company, at the time I purchased this stock I was familiar with its books, holdings, assets and liabilities. It was a minority interest of the stock unsalable. No man would buy it. You couldn't sell it at any price to a disinterested party. If you take this whole stock of the corporation and place it in one man's hands, it has a different valuation from one-third each in three men's hands. Two-thirds controls it, and the other third has no representation, nothing at all, could gain no influence from it. That business hasn't paid a dividend for twenty years. What is the value of the stock, who knows it? I don't. I am not smart enough to tell. Maybe you can find it out. No one can tell as to the value of the stock.

79 Redirect examination:

To Mr. Coogan:

The conversation with Mr. Palmer on the morning of the 3rd was as follows:

In response to Mr. Palmer's telephone message, I went up to the bank at a trifle after ten o'clock in the morning. I went in. Mr. Palmer was sitting at his desk. I said, "Good morning, Mr. Palmer, I have come up to the bank in reference to your telephone message. Does the bank still want to sell that stock?" He looked at me a minute, hesitated, and said, "Well, Mr. McBoyle, I am selling you that stock very cheap, very cheap, indeed, but Mr. Brown says sell it, and I want to get it off the books." "Well," I says, "it's up to you, then, Mr. Palmer, to say whether it is to be sold or not. If you say so, I will get the money." He says, "Well, go get your money; you can have the stock." Then I said, "Mr. Palmer, you understand for whom I am buying this stock; you understand that my wife is buying it, that I am to pay you the $1,500 down that belongs to her, and put up my note temporarily, until such a time as I can afford to take this money from the mill." We needed the money, and I did not want to take that $5,500 out of the mill until such a time as I can take that money out of the mill and get
80 a chance to sell her property, and necessarily I am to have a year on that stock. "Oh," he says, "Mr. McBoyle, we can't take a year note here, that is contrary to the rules of the bank, but I will make a demand note and see personally that you have all the time you want." I said, "Very well, satisfactory to me; if you say so, I will go and get the money." He said, "Go and get your money; you can have the stock." I went over to the Oakland Bank of Savings and upon returning to the Union National Bank, I saw Mr. Palmer. The Oakland Bank of Savings is situated in the City of Oakland, and was at the time of which I am speaking, directly across the street from the Union National Bank. I said to him, "Mr. Palmer, here is your $1,500; to whom shall I give it?" He

said take it to Mr. Schammel; he has your stock." I then saw Mr. Schammel, and the interview with him was as I have heretofore detailed. Mr. Schammel was then at the Union National Bank, at his customary place. The interview upon the morning of the 3rd also took place at the Union National Bank. When I arrived at the bank on the morning of the 3rd, it was about 10 o'clock. It was during banking hours that this transaction was consummated, at the usual place of business of the bank. The $9,500 and the
81 $1,500 cash was mentioned after the price of $11,000 had been agreed upon. Mr. Palmer said to me, "Good-bye and good luck." At the time of making out the note Mr. Schammel said, "you are all right, you have got a bargain."

"High was a director of the Burnham-Standeford Company at the time when this note which has been introduced in evidence was made. He is a director of record yet. The Union National Bank owned that certificate, and those shares, and Mr. High represented the Bank for a series of years and he did represent them at the time of this transaction. I acted in absolutely good faith in this transaction. I made the offer in good faith and accepted in good faith."

"I frequently talked with Mr. Schammel during the time that he was connected with the bank with reference to the business of Burnham-Standeford Company. It was probably once or twice a month that I talked to him. Whenever I was in there I would see Schammel. He would say "How is the business getting along? How are you getting along down there?" And I would say, "First rate," about how the business was averaging. From 1896 up until 1907 the President of the Bank was Thomas Prather. I frequently
82 talked with Mr. Prather about the business of the Burnham-Standeford Company.

Prior to January 2, 1907, I talked with Mr. Palmer, the then cashier of the bank, a number of times in relation to the business and affairs of the Burnham-Standeford Company I remember one conversation in particular which occurred in the latter part of October, 1906, at the Union National Bank. Mr. Palmer said to me on that occasion, "How is business down there?" I told him it was very good. "I can tell you in a few words," I said; "if our stock (that is, our merchandise) is worth what we took it up at and our accounts good, we have enough to pay off all our debts and leave our plant pretty clear." He said, "Well, that is good, pretty soon you can begin paying in money; you won't need so much money." Before the last week of October or the first week of November, 1906, I talked with Mr. Palmer several times about the business of the Company. I talked with him freely from time to time with relation to the business and affairs of the Company.

Cross-examination:

To Mr. Fitzgerald:

Mr. Palmer knew the holdings of the Company. I told him about how business was running. I had a conversation with
83 Mr. Prather relative to the probable value of the stock. Mr. Prather called me up there on day and said "What do you

want for your stock? I hear you want to sell it." I said, "Yes, I do want to sell my stock. What would you give me for it?" He said, "What do you want for it?" And I said "Do you think it is worth $30,000?" He laughed and said, "No." I said, "Worth twenty?" He says "No." "Well," I said, "give me an offer for it." He stopped a minute and says "No, I won't." He says "It is only a small part of this stock, and you can't sell it; you can't get anything for it; anybody who would want it would want to buy the control." He says, "You can keep that stock and we will all sell together." I said, "I guess I will have to."

Mr. Coogan: And, of course, it is conceded that during the time that the property stood in the name of the bank as pledgee, Mr. High represented the bank at the meetings of this corporation.

Mr. Fitzgerald: I do not know that, but I will stipulate that at the time that the Bank acquired title, and for a short time prior, that Mr. High was a director in the Burnham-Standeford Company.

84 The Court: Representing the interests of the bank?

Mr. Fitzgerald: Yes.

The Court: Very well, that is agreed upon, then.

The Court:

Q. Was it when the bank held as pledgee, or when the bank became owner of the stock that Mr. Palmer receipted for it?

A. When the bank held it as pledgee, that was in June, 1897.

Mr. Coogan: I presume we could agree on those things. The fact is, the bank afterwards acquired title to it.

Mr. Fitzgerald: That is the fact.

Mr. Coogan: That is the fact, your Honor.

Mr. *Coogan*: They were pledgee at one time, and afterward acquired the legal title Coogan. The bank acquired title to it in to it, as I understand.

Mr. Fitzgerald: That is the fact, *Mr.* May, 1904.

The Court: And held it as pledgee before that?

Mr. Fitzgerald: Held it as pledgee before that.

85 The Court: That is agreed on then?

Mr. Fitzgerald: May, 1904, became owner of the stock.

The Court: Very well.

Mr. Coogan: It was there as security for a note, and the bank took it in in the enforcement of its rights as a pledgee.

Mr. Fitzgerald: And also the stock belonged to Mr. Burnham. It was put up at assignees' sale in an insolvency proceeding of Burnham, bought by a Mr. Robinson, and then that title, whatever it may be, was sold to the bank.

Mr. Coogan: Bought for one dollar.

Mr. Fitzgerald: I don't know. It was not counted for any more than the loan on it at that time. It was sold to the bank and the receipt was $100, but it included other property, and the bank bought Mr. Robinson's title at that time, May, 1904; in addition to the lien and right, they had to acquire the title.

Mr. Coogan: They did that so as to get the legal title to it in a more explicit way than if they had enforced it.

The Court. Those matters agreed upon?

Mr. Fitzgerald: I have stipulated to those.

86 The Court: Very well, those matters are agreed upon.

GEORGE SCHAMMEL, a witness on behalf of plaintiffs was sworn and testified as follows:

Direct examination:

For three years, next prior to the 1st day of March, 1909, I was assistant cashier and note teller of the Union National Bank. The bank had a journal of its daily transactions (at this point the witness identified the book handed him by counsel for plaintiffs which was designated ("General Journal 27") as one of the journals kept by defendant in the usual course of its business).

The Witness (continuing): These entries were not made by me. Mr. Fasey acted as general bookkeeper in January, 1907, and he made these entries. I wrote out the underlying tickets for him. The underlying entries were originally written by me. The information contained in the entries was furnished the bookkeeper by me. The information given him, in respect to any transaction that took place on that day was correct so far as it went through my observation. On January 3, 1907, I furnished the bookkeeper with

87 information respecting the sale of the certificate No. 59, representing 599 shares of the stock of the Burnham-Standeford Company. He received it on a certain little ticket, at the close of business, and he copied from the ticket, making the entry on the book.

Mr. Coogan.

Q. I now ask you if you will kindly read the entry under the date referred to with reference to the transaction?

A. (Reading:) "Bond investment 599 shares of Burnham-Standeford sold at $11,000. Credit interest account 500. A total of $10,500.

Mr. Coogan:

Q. What is that "540"?

A. That is the page to which it is posted in the ledger.

Q. Then this entry was posted in the ledger of that bank at that time?

A. Yes, sir.

Q. In the usual course of business?

A. Yes, sir.

The Witness (continuing): The entries in the journal are usually made in the afternoon after the bank closes, and the posting is attended to the following morning.

88 Mr. Coogan:

Q. Now, I would like to have the minutes of the Board of Directors' meeting held on January 4th, 1907. State whether or not there was

a meeting of the Directors of the Union National Bank held at the office of the bank on January 4th, 1907?

A. Yes, sir, there was a special meeting of the Board of Directors held on January 4th, 1907.

Q. Will you state whether or not there was a stockholders' meeting of that bank held on January 8, 1907?

A. Yes, sir, there was a stockholders' meeting held on January 8, 1907.

Q. State whether or not there was a regular meeting of the board of directors of that bank held on January 11, 1907?

A. There was a special meeting, another special meeting on January 11th.

The Court:

Q. But not a regular meeting?

A. No, not a regular meeting, but a special meeting.

Mr. Coogan:

Q. And what was the meeting of January 4th?

A. Also a special meeting. They were both special meetings.

89 Q. And the meeting of January 8th was the regular annual meeting of stockholders?

—. ——.

Cross-examination:

Mr. Fitzgerald: We will offer in evidence the minutes referred to by the witness on the stand. That is, the minutes of the 4th of January, 1907, 8th of January, 1907, and the 11th of January, 1907.

The Court: Of the minutes of the board of directors, the first and last, and the other of the stockholders.

Mr. Fitzgerald: Yes, your Honor, January 8th is the stockholders', and January 11th special meeting of the board.

The Court: And January 4th special meeting of the board.

Mr. Fitzgerald: January 4th special.

The aforesaid minutes were thereupon received in evidence. The said minutes of said special meeting of the board of directors of the defendant bank held January 4th, 1907, were in the words and figures following, to-wit:

"OAKLAND, January 4, 1907.

"At a special meeting of the board of directors of the Union
90 "National Bank, held this day, there were present Directors "Edson F. Adams, John Charles Adams, R. S. Farelly, Bush "Finell, Palmer, and President Prather in the chair; absent, Director "George Levison. Upon motion duly made and seconded, Mr. "J. Dalzell Brown was elected director in the place of Mr. George "Levison, whose place became vacant by his disposing of his stock "and the stock having been cancelled. The reading of the minutes "of the last regular meeting, held *in* December 1, 1906, was dis- "pensed with. Mr. Thomas Prather handed in his resignation as "director and president, which was accepted with many remarks of

"gratitude for the valuable service rendered the bank. On motion
"of Mr. Edson F. Adams, duly seconded, Mr. C. E. Palmer was
"elected president of the bank for the unexpired term of Mr. Prather.
"Upon motion of Mr. Finnell, seconded by Mr. Adams, Mr. W. W.
"Crane was elected cashier and secretary to fill the vacancy of Mr.
"Palmer, who had been elected president. Upon motion of Director
"Brown, seconded by Director Finell, Mr. George D. Gray was
"elected director to fill the place of Director Thomas Prather, re-
"signed. Director E. F. Adams tendered his resignation as vice-
"president and also as director. Upon motion of Mr. Prather,
91 "seconded by Mr. Finnell, a vote of thanks was tendered
"Mr. Adams for his valuable services as vice-president in the
"many years of his holding office, and it was the general sentiment
"of the board that it is a great regret that Mr. Adams has severed his
"connection with the bank. Upon motion, duly made and seconded,
"Mr. James L. de Fremery was elected director to fill the place made
"vacant by the resignation of Mr. Adams as director. On motion,
"duly made and seconded, Mr. J. Dalzell Brown was elected vice-
"president to fill the vacancy caused by the resignation of Mr.
"Adams. There being no further business appearing, the meeting,
"on motion, adjourned.

"C. E. PALMER, *Secretary.*"

The said minutes of said regular annual meeting of the stockholders of the defendant bank, held January 8, 1907, were and are in the words and figures following, to-wit:

"TUESDAY, January 8, 1907.

"The regular annual meeting of the stockholders of the Union
"National Bank was held this day at 3 o'clock P. M. at the office of
"the above bank. Mr. J. Dalzell Brown, vice-president, called
92 "the meeting to order, and Mr. W. W. Crane acted as secre-
"tary. After calling the roll of the capital stock, the meet-
"ing was adjourned for two weeks from this date, owing to the
"funeral of our late honored director, Robert S. Farelly.

"W. W. CRANE, *Secretary.*

"Adjourned to January 22, 1907."

The said minutes of said special meeting of the board of directors of the defendant bank held January 11, 1907, were and are in the words and figures following, to-wit:

"TUESDAY, January 11, 1907.

"At a special meeting of the board of directors of this bank, held
"this day, there were present Directors James L. de Fremery, Charles
"E. Palmer, John Charles Adams, and J. Dalzell Brown. Mr. C. E.
"Palmer in the chair. Absent, Director George D. Gray. The
"minutes of the last regular meeting were read and approved. A
"motion was made, seconded and carried, approving the action of
"the officers in declaring stock dividends for preceding six months

"at 8% per annum. It was moved by Mr. Brown, seconded and
"carried, to elect Mr. E. P. Vandercook a director in the
93 "place of Mr. Bush Finnell, resigned. It was moved by Mr.
"Brown, seconded and carried, to elect Mr. R. M. Kenny
"a director in place of Mr. R. S. Farelly, died. Mr. Brown gave
"thirty days' notice to amend article III of the by-laws so as to
"allow the election of two assistant cashiers. It was moved by Mr.
"Brown, and seconded by Mr. Adams, that Mr. Charles F. Hanley
"be appointed auditor of the bank. Carried. Mr. Brown gave thirty
"days' notice to amend article IV of the by-laws, that the regular
"directors' meeting of the bank be held on the final Wednesday of
"each month at 3 o'clock P. M., instead of Saturday. No other
"business appearing, upon motion, the meeting was declared ad-
"journed.

"W. W. CRANE, *Secretary.*"

Plaintiffs thereupon rested.

GEORGE McBOYLE, recalled as a witness on behalf of defendant-, testified as follows:

I received from the Union National Bank a writing concerning this stock, after January 3rd. Mr. W. W. Crane called at my place of business on January 21, 1907. Mr. Woolner was with him.
94 The Witness (continuing): I personally attended to this transaction entirely. Mr. Crane at that time left a paper with me. A copy of the papers which Mr. Crane had, in addition to the note, was left with me at the time. (The witness thereupon handed said paper to defendants' counsel.)

Said paper — was thereupon read in evidence, was and is in the words and figures following, to-wit:

"DEFENDANTS' EXHIBIT I."

OAKLAND, CAL., January 19th, 1907.

Geo. McBoyle, Oakland, Cal.:

You are hereby respectfully notified that the following resolution was unanimously passed by the board of directors of the Union National Bank of Oakland, California, a corporation, at a special me-ting held by said directors on the 19th day of January, 1907, at the City of Oakland, County of Alameda, State of California.

Whereas, it has come to the knowledge of the board of directors of this corporation that on the third day of January, 1907, Geo. McBoyle attempted to purchase from Chas. E. Palmer, cashier of this corporation, certain personal property belonging to this cor-
95 portation and consisting of certificate number 59, representing 599 shares of the capital stock of The Burnham-Standeford Company, a corporation, for the sum of eleven thousand dollars ($11,000) gold coin of the United States; and

Whereas, the said cashier being then and there misinformed and misled as to the value of said property, accepted the sum of one thousand and five hundred dollars ($1,500.00) on account thereof

and the promissory note of said McBoyle for the sum of nine thousand and five hundred dollars ($9,500), and,

Whereas, all and each and every act of the said Chas. E. Palmer, pertaining to said pretended sale to the said Geo. McBoyle were and each of them was wholly unauthorized and wholly beyond the scope and power of the said Chas. E. Palmer as cashier of the corporation and directly in violation of and contrary to law;

Now, therefore, be it resolved, that all and each and every act of the said Chas. E. Palmer, as cashier of this corporation or otherwise in connection with or pertaining to said purported or pretended sale of that certain personal property belonging to this cor-
96 poration, the same being certificate number 59 representing 599 shares of the capital stock of "The Burnham-Standeford Company," a corporation, to the said Geo. McBoyle, on the third day of January, 1907, be and the same are hereby repudiated, rescinded, vacated, set aside and annulled; and,

Be it further resolved, that this corporation hereby and herewith rescinds and repudiates said purported and pretended purchase or sale of said personal property to the said Geo. McBoyle, and repudiates and refuses to accept the payment of $1,500.00 made by the said McBoyle to this corporation and repudiates and refuses to accept the promissory note of said McBoyle heretofore referred to; and

Be it further resolved, that the cashier of this bank be and he is hereby authorized and empowered for and as the act of this corporation to return, restore and deliver to the said Geo. McBoyle, said sum of $1,500.00, gold coin of the United States, with interest thereon at the legal rate from the third day of January, 1907, to the date of the tending or delivery of said sum of $1,500.00 to the said Geo. McBoyle and to return, restore and deliver to the said Geo. McBoyle said promissory note; and

97 Be it further resolved, that the cashier of this bank be, and he is hereby authorized, directed and empowered for and as the act of this corporation, to serve or cause to be served upon the said Geo. McBoyle a notice of the act of the board of directors of this corporation in relation to said purported sale of said personal property.

You are further notified that in pursuance of said resolution said The Union National Bank of Oakland, California, rescinds a certain purported and pretended sale of the following personal property, to-wit: certificate number 59, representing 599 shares of the Burnham-Standeford Company, a corporation, claimed to have been made to you on the third day of January, 1907, by Chas. E. Palmer, cashier of this bank.

The sum of one thousand and five hundred dollars ($1,500) gold coin of the United States, with interest thereon at seven per cent per annum from the third day of January, 1907, to the date hereof, is hereby returned and restored to you and tender and offer of the same is hereby made.

A certain promissory note, made, executed and delivered by you on said last mentioned date to this corporation, the same being
98 in the sum of $9,500.00 gold coin of the United States, with

interest, is herewith returned and restored to you and tender and offer of said promissory note is hereby made.

THE UNION NATIONAL BANK OF OAKLAND, CALIFORNIA, A CORPORATION,
By W. W. CRANE, *Cashier.*

(Endorsed on back:) Notice of Action of Board of Directors and Re-cission.

Mr. Fitzgerald:

Q. On or after the 21st day of January, the date on which you received this paper, did you receive any communication in writing from the Union National Bank?

A. I did.

Q. Will you kindly produce it?

(The witness thereupon produced a letter and handed the same to plaintiffs' counsel.)

Mr. Fitzgerald:

Q. When did you receive the paper which you handed me?

A. I think I received that on the 22nd. I had to go to the post office to get that; that was a registered letter.

Q. This is the envelope it came in?

Mr. Fitzgerald: We offer in evidence the envelope and the paper handed by Mr. McBoyle to me.

99 Said letter, which was thereupon read in evidence and marked

"DEFENDANTS' EXHIBIT 3,"

was and is in the words and figures following, to-wit:

January 21, 1907.

George McBoyle, Esq., Oakland, Cal.

DEAR SIR: We have this day deposited for your credit in the Oakland Bank of Savings $1,528.50, also your note of $9,500, the same of which we made you a tender this day. This money which we return to you is that which you deposited in your attempted purchase of 599 shares of stock in the Burnham-Standeford Milling Company.

Very truly yours,

W. W. CRANE, *Cashier.*

Cross-examination:

To Mr. Coogan:

At various times from the time of the purchase of the stock in question to the time that Mr. Crane called at the office of the Burnham-Standeford Company, I was at the office of the Union National Bank. I was there on the 15th, 12th, 14th and 16th. I met Mr.

Palmer on two occasions and conversed with him. I also saw and conversed with Mr. Schammel and Mr. Crane.

100 The Witness (continuing): On the 16th day of January I had a talk with Mr. Palmer, the then president of the defendant corporation, with respect to the purchase of this stock by me. I went in to see Mr. Palmer. Said I, "Mr. Palmer, I understand there is going to be some trouble about that transaction of mine; if you are not satisfied with the security, I will put up my wife's note that she holds against the Burnham-Standeford Company." He says, "Oh, no," he says, "the way they are talking, there is ample security there now." I said, "Mr. Palmer, I don't want you to take any snap judgment on me." He said, "I'll see that they don't take any snap judgment on you." He says "That sale was made in good faith." He said, "I have sold the stock" and he says "I sold the stock and"—I don't know how he got that out now—"and I am glad I got rid of it."

Said minutes of the said meeting of the board of directors of said bank held January 19, 1907, (which were thereupon read in evidence) were and are in the words and figures following to-wit:

"SATURDAY, January 19th, 1907.

At a special meeting of the board of directors of this bank, held at its office this day there were present directors John Charles

101 Adams, James L. de Fremery, R. W. Kenny, Charles E. Palmer and E. P. Vandercook. Upon motion duly seconded the minutes of the previous meeting were dispensed with. Mr. Palmer stated that the object of this meeting was to pass a resolution rescinding his action as cashier in selling 599 shares of the capital stock of the Burnham-Standeford Co., held by this bank. On motion of Mr. Vandercook, seconded by Mr. Adams, the resolution to rescind such action hereby attached to their minutes was unanimously carried. It was moved by Mr. Adams, and seconded by Mr. Kenny to pass resolution hereto attached authorizing the cashier to have stock of the Burnham-Standeford Co., now held in the name of W. H. High, trustee, transferred to the name of the Union National Bank of Oakland. No further business appearing, upon motion the meeting was duly declared adjourned.

W. W. CRANE, *Secretary.*"

Resolution.

"Whereas this corporation has among its assets certain personal property, to-wit, certificate No. 59 representing 599 shares of the capital stock of the Burnham-Standeford Company, a cor-

102 poration, which said stock stands upon the books of said The Burnham-Standeford Company, a corporation, in the name of Wm. H. High, trustee, and whereas it is desirous that said personal property be transferred upon the books of said last mentioned corporation, and placed in the name of this bank, therefore be it resolved that W. W. Crane, cashier of this bank be and he is hereby directed, authorized and empowered to present to the secretary of

the Burnham-Standeford Co., a corporation, said certificate of stock, and to demand for and on behalf of this bank the transfer thereon on the books of said, The Burnham-Standeford Co., a corporation, to the name of the Union National Bank of Oakland, California, a corporation."

Defendants' counsel thereupon read in evidence the

Deposition of C. E. Palmer,

which said deposition was taken on behalf of plaintiff- in the City of Oakland, California, in the month of December, 1907. Said witness testified as follows:

Direct examination:

To Mr. Powell:

I am president of the defendant Union National Bank.

103 The witness thereupon produced the book of by-laws of said bank.

The Witness (continuing): These are the by-laws of the bank (referring to said book of by-laws).

Mr. Powell: We will offer in evidence article VI of the said by-laws. Said article was and is as follows:

"The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange, and issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors, of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. He shall at any meeting of the directors or stockholders, make a full report embracing a general review of the transactions and business of the bank from the date of the last previous report, to the time of such meeting, and upon application furnish information pertaining to the business."

The Witness (continuing): On January 2nd and January 3rd, 1907, I was cashier and secretary of the bank. On January 4th, 1907, I became president of the bank. I know Mr. George
104 McBoyle. I was acquainted with him on January 2nd and January 3rd, 1907.

Mr. Powell:

Q. You sold him the shares mentioned in the complaint, 599 shares of the Burnham-Standeford capital stock, did you not?

A. Well, I suppose I sold it to him. I do not know what other answer I could make.

Mr. Powell:

Q. In what capacity were you acting?

A. Well, I was acting as cashier, I expect.

Q. How many shares were there?

A. You see, I did not sell it to him myself. When he came, I told him that I would have to consult with Brown. You see we were in a state of upheaval at that time, I do not know whether I said Brown, or who I said. I told him I would let him know the next day.

Q. Did you consult with somebody?

A. Yes sir.

Q. Then what was your answer?

A. I told him that Mr. Brown said, "Let it go."

Q. And you so informed Mr. McBoyle?

105 A. Yes, I told him if he would come the next day, I would let him know. I think that is right. Wasn't it, Mr. McBoyle?

Mr. McBoyle: Yes.

The Witness (continuing): I told Mr. McBoyle to go to the note clerk and arranged it there. He was going to pay a certain amount down, I think $1,500. I think he paid it to Mr. Schammel, and assistant cashier and note clerk.

The arrangement was that he was to pay so much, and give a note for $9,500 for the balance. He gave that note and the stock (the 599 shares) were left as security. Mr. Schammel had charge of all the notes of the bank. I couldn't tell you exactly how long the bank held those 599 shares. It was a long time, it is quite a number of years. I do not know whether it is 10 years or 20 years. Something of that order. No dividends have ever been paid on those shares to my knowledge. The bank held them during all that time. At the time I made the sale, I told Mr. McBoyle that the bank commissioner had criticised the bank for holding these shares so long.

Mr. Powell:

106 Q. What connection had J. Dalzell Brown with the bank on January 2nd and January 3rd of this year?

A. Well, it was right in the midst of that, that the transfers of stock were being made, and he was—at that time he was supposed to come into the power of controlling the bank.

Q. Did he or did he not have a controlling interest in the bank on those dates?

A. I would have to look on the transfer of the stock. You see there was lots of things done right there in a day or two, and I do not know whether the stock has been transferred or not, but I knew—at least I knew from general—supposed I knew from general talk that Mr. Prather had sold him and his associates the controlling interest. Whether the stock was transferred on the 4th or 3rd or 5th, I do not know. It was just understood there between us that he was coming into control of the bank I do not know what day the stock was transferred, and whether it was the 3rd or 4th or 5th, somewhere along there. Our record will show that. Our stock certificates will show what day the stock was transferred. Mr. Brown got his interest in the bank from Mr. Prather. That is, Mr.

107 Prather negotiated—Mr. Prather got the stocks for him. Mr. Prather was acting in the capacity of delivering the

stock, his own with others. I do not know the date when Brown had the stock transferred. Brown was supposed to take possession on January the 2nd. That is, Mr. Prather, I do not think, had anything more to do after that. They were all there together, waiting to have the matter adjusted, the stock transferred, and things of that kind, and it was a day or two before the whole thing was consummated. I consulted with Mr. Brown, with reference to the sale of this stock on January 2nd, or 3rd; on January 2nd I think it was; I let Mr. McBoyle know on the 3rd. Possibly I let him know by telephone, on the afternoon of January 2nd, so that he might come up the next morning to complete the arrangement. I might have done it, I would not dispute that. Mr. McBoyle was there on the morning of January 3rd, at about 10 o'clock. That was the next morning, after we had our talk. At that time he consummated the transaction. The note was given on the 3rd and he must have come up the next morning. I believe the $1,500 was paid
108 at the same time. My consultation with Mr. Brown must have been on the afternoon of the 2nd, on the afternoon that Mr. McBoyle was there, I saw Mr. Brown at the bank. I have an impression that Mr. McBoyle's first conversation with reference to the sale of this stock was in the morning. We were in such—you can imagine a bank changing everything; why, we were in quite a commotion at that time. It was a surprise all around. I do not remember. It is my impression he was there in the forenoon. I did not inform him that the sale would be made. I told him I would consult Mr. Brown or consult somebody, and let him know the next day, if I remember it right. When I had my talk with Mr. McBoyle, I think I said that I would let him know the next day. but if I had seen Mr. Brown I may have notified him. I would not dispute that. I do not know, I did not think there was anything to remember about it at the time, and I did not give much attention to that part. I had other things, all this stock to transfer, and so many things to do that I couldn't tell whether it was in the afternoon or forenoon. The Union National Bank had been ac-
109 commodating the Burnham-Standeford Company with loans prior to this time. They were owing the bank at this time quite a large sum, I had seen a number of statements of the Burnham-Standeford *to* before. I have not seen anything very recent, but a few years before that I had seen statements. Mr. High, our assistant cashier, who was formerly in the bank had entire charge of this matter. I had nothing to do with that at all. He had been out of the bank for some time. The Union National Bank had been accommodating the Burnham-Standeford Company with loans prior to this time. They were owing the bank at this time quite a large sum, I had seen a number of statements of the Burnham-Standeford Company before. Mr. High was still a director of the Burnham-Standeford Company, representing, as I supposed, the bank. I will state here that Mr. McBoyle or the Burnham-Standeford never came to me on these affairs at all. Mr. Prather attended to that entirely. Mr. Prather during those years was president of the bank. Mr. Prather and Mr. High were the ones that attended

to that affair entirely. Mr. Schammel succeeded High when
110 he went out. Before that he was just a bookkeeper. After Mr. High went out of the employment of the bank, he still represented the bank in the Burnham-Standeford Company. The Burnham-Standeford Company owed the bank on January 2nd, 1907, to make a guess at it probably 30 or 34 thousand dollars. Something of that figure. I think it was fairly late in the afternoon, quite late, that Mr. Brown and I talked over the matter of the sale of this stock. I explained to Mr. Brown at that time the relations of the bank with Burnham-Standeford Company, and what this stock meant, and how long the bank had held it. I told him my opinion of it; I told him I thought it was a good sale. I certainly thought it was a good sale or I should not have made it.

Cross-examination:

To Mr. Chapman:

Mr. McBoyle never has been a stockholder in the Union National Bank. At the time J. Dalzell Brown directed me to sell this stock, he was not a director or officer.

Q. At the time J. Dalzell Brown desired you to sell this
111 stock you did not even know that he was a stockholder, did you, in the Union National?

A. No.

Q. You do know that he was not a director or officer at that time?

A. That is right.

Q. So that J. Dalzell Brown was not in control of the bank at that time?

A. Not officially, no.

Q. You anticipated that he would in a day or two, be in control of the bank, did you?

A. That is right.

Q. But, as a matter of fact, he had no authority whatever, over the affairs of the bank at the time he directed you to make this sale?

A. No, not officially.

Q. Do you remember without referring to the minutes, when he became a director of the bank, and an officer of the bank?

112 A. I think it was on the 4th, if I remember right.

Q. Prior to the 4th, the $1,500 had been paid, had it?

A. Yes, sir.

Q. By McBoyle?

A. Yes, sir, I think so. According to the note, the $1,500 was paid on the 3rd.

Q. Did Mr. J. Dalzell Brown attend any meeting of the board of directors of the Union National Bank, prior to the time of the passage of this resolution that has been referred to? Was there any meeting?

A. Oh yes, we had a meeting on the 4th. That was his first appearance.

Q. That was the meeting at which he was elected?

A. Yes, sir.

Q. Will you look at the minute book and see if there was a meeting of the board of directors between that date and the date of the resolution?

A. Yes, sir. There was a special meeting on January
113 11th. Mr. Brown was present at that.

Q. That was a special meeting. What do the minutes show that that was called for?

A. That was for declaring a stock dividend.

Q. Was there any other object for that meeting?

A. Yes, there is the resignation and election of one of the former directors.

Q. What is the date of that meeting?

A. January 11th.

The Witness (continuing): There was also at that meeting the election of a man as auditor of the bank.

Mr. Chapman:

Q. Now between the 11th and the date of this resolution, which I believe is on the 19th, there was no meeting, special or otherwise, of the board of directors?

A. No, sir.

Q. Did you have any talk with Mr. McBoyle as to the value of this stock, before the attempted transfer of it?

A. I had no talk except at the time of the proposed sale.

114 Q. Was there anything said by him as to its value?

A. Yes, he said that he had not paid any dividend or was not likely to pay any dividend. That is about the substance of it which I knew.

Q. You did not know that it would not pay dividends?

A. Oh, no.

Q. But you knew that it had not?

A. I knew it had not.

Q. And so much of the statement as referred to the past, you coincided with?

A. Yes.

Q. As to the future you have no knowledge?

A. I have no knowledge.

Q. You did not as a fact know that at the time the Burnham-Standeford Company was a paying concern?

A. No, sir.

Q. And was prosperous?

A. No, sir.

115 Q. And that its stock was worth much more than that offered for it by Mr. McBoyle?

A. No.

Redirect examination.

Mr. Powell:

Q. Mr. Palmer, at what date did you first begin to consult Mr. Brown about the business of the bank?

A. Well, I think this is about the first *thing* that I said anything to him about anything about the bank. I had not seen him much of any before that.

Q. Had you seen him before in the bank?

A. No, I guess that was the first time he was in there.

Mr. Powell:

Q. Don't you know that he had made the bargain for a controlling interest in the bank in December of last year?

A. No, sir, I do not know exactly the day that I did know, but it was about January 1st, or 2nd, the first I ever heard of it at all.

Q. That was on the 1st of January of this year?

A. Yes, that was on the 1st day of January. I was home that day.

116 Mr. Chapman:

Q. He said he was about to take the stock?

A. He said that he was about to take possession, or take the stock, something of that kind. Anyway I inferred he was to take Mr. Prather's place.

Mr. Powell:

Q. What did he ask you?

A. Wanted to know if I would stay with the bank; said he did not like to have any changes in the bank, and wanted me to stay.

Q. What else did he say with reference to the management of the bank?

A. There was nothing about the bank, excepting the force that he was to keep; spoke about Mr. Crane, and said he thought he would keep Mr. Crane, and did not want to have any changes.

Q. In what position?

A. Cashier.

Q. And what position did he offer you?

A. He wanted to know if I would not stay as president.

Q. Did he mention the names of any one else that was in the employ of the bank at that time?

117 A. I do not think he did. Those were the two principal offices. He did not stay there but a short time.

Mr. Powell:

Q. And when did you see him next?

A. I think that the next time I saw him was that afternoon that he came over.

Q. Had you been told by Mr. Prather or any one else that Mr. Brown was going to take charge of affairs there?

A. Well, Mr. Prather told me that, that same New Year's day; wanted to know if I was going to be home, that Mr. Brown was coming up to see me; that he had sold his stock; telephoned to me, so I stayed home.

Q. Had sold his stock to whom?

A. To Mr. Brown, and his friends, whoever they were. Mr. Brown did not take it all. He had a number of people. I do not know whether they were friends or associates; some way.

Q. And on the same day, later in the day, Mr. Brown called himself and had this conversation about your continuing as president of the bank?

A. That is right, yes, sir.

118 Q. And the next day Mr. Brown was there at the bank?

A. Yes, he came over, I think, in the afternoon, to this meeting.

Q. And what meeting was that?

A. Well, it was—I think very likely that it was to make this transfer or delivery of the stock. I do not know when the stock was transferred on the records, but Mr. Prather had charge up to the 2nd. That was the 1st day of the year, and the stock, as I understand it, was to be delivered that day.

Q. The board of directors were in session then, that day, were they not?

A. I do not think they were. I think the fourth was the first.

Q. What meeting do you refer to?

A. The meeting of Mr. Prather and Mr. Brown. They were looking up to Mr. Prather up to that time.

Recross-examination.

Mr. Chapman:

Q. Mr. Palmer, the first time that you ever heard of any transfer from Prather to J. Dalzell Brown was on New Year's day?

119 A. Yes, sir.

Q. And you learned it from Prather over the phone?

A. That is right.

Q. Do you remember whether he said he had sold his stock, or was going to sell his stock to J. Dalzell Brown?

A. No, I couldn't tell.

Q. As a matter of fact the stock was not transferred?

A. Oh, no.

Q. Prior to the 2nd day of January at all?

A. Oh, No. At least I do not know what day, whether it was on the 3rd or 4th.

Q. As a matter of fact, at the time you talked with J. Dalzell Brown with reference to the transfer of this stock to McBoyle, no stock had been transferred to him by Prather or anyone else—no bank stock—so far as you know?

A. No. No, I do not think it had. It may have been done that day some time, or that afternoon when he came over, but I do not know.

120 Mr. Powell:

Q. Upon that day, you mean January 2nd?

A. Yes. I do not know whether the stock was transferred on the 2nd or 3rd or 4th somewhere along there.

Mr. Chapman:

Q. And you do know that at best he was nothing more than a mere stockholder prior to the 4th of January, when he was elected?

A. Yes, sir.

GEORGE MCBOYLE, recalled as a witness on behalf of defendant, testifies as follows:

Cross-examination.

Mr. Coogan:

Q. Who was the cashier of that bank at the time that you first became familiar with it in 1896?

A. Charles E. Palmer.

Q. And did he contiuue in that position during all the years of his life?

A. I think so.

Q. He is now dead, I believe?

A. Yes, sir.

121 The Court: The evidence shows he was cashier and president.

Mr. Coogan: He was cashier up to the time he was elected president?

A. Yes, up to the time he was elected president.

Mr. Coogan: It is admitted, if your honor please, Charles E. Palmer was elected cashier of the defendant on the 11th day of January, 1882, and continued to be re-elected and acting as such until his elevation to the presidency on the 4th day of January, 1907, is that correct, Mr. Fitzgerald?

Mr. Fitzgerald: I think that is correct.

The Court: Well, that is admitted for the purposes of the case.

Mr. Coogan: Yesterday I called Mr. Schammel and called his attention to an entry that was in the books of the defendant corporation under date of January 3rd, 1907, in the same book, which reads thus—"George McBoyle 9500." Under the head of January 3rd, 1907, by loan and discount.

The Court: By loans and discount George McBoyle 9500 is the order in which it comes?

Mr. Coogan: Yes, sir.

122 The Court: That entry may be deemed in evidence.

Thereupon both sides rested.

The foregoing contains a statement of all matters occurring upon the trial in the presence of a Court bearing upon the exception or any of the exceptions presented in this bill of exceptions.

Thereafter, to-wit, and on the 26th day of June, 1913, the Court made and rendered its decision and findings in favor of plaintiffs and against defendants in said cause, which said decision and findings were thereafter filed with the Clerk of said Court, to each and all of which defendants duly excepted, and said exception is hereby designated

Exception No. 1.

Judgment was thereupon ordered rendered and entered in said cause in favor of plaintiffs and against defendants as shown by the judgment roll in this action, to each and all of which defendants duly excepted, and said exception is hereby designated

Exception No. 2.

Thereafter and within a time allowed by law defendants
123 duly served and filed their notice of appeal from the said judgment entered herein and duly and regularly perfected their appeal to the Supreme Court of the State of California from said judgment;

That said notice of appeal is in words and figures following, to-wit:

[Title of Court and Cause.]

Notice of Appeal from Judgment.

To the clerk of the above-entitled court and to the plaintiffs in the above-entitled action and to T. C. Coogan, Esq., Messrs. Powell & Dow, and William H. Orrick, Esq., their attorneys:

You and each of you will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of California, from the judgment herein made on the 6th day of November, 1913, and the whole thereof, in favor of the plaintiffs and against the defendants, which said judgment is entered in book 98 of judgments at page 249 thereof.

124 Dated January 5th, 1914.

LEON A. CLARK,
FITZGERALD & ABBOTT,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Defendants and Appellants.

Assignment of Error.

The defendants now assign as error the following, to-wit:

I.

Errors in Law.

1. The Court erred in finding in favor of the plaintiffs and against defendants as specified in exception No. 1 as set forth in the foregoing bill of exceptions.

2. The Court erred in rendering and entering judgment in favor of plaintiffs and against defendants as specified in Exception No. 2 as set forth in the foregoing bill of exceptions.

3. The Court erred in finding that Charles E. Palmer, cashier of defendant bank, in making said sale did not act beyond his power or authority as cashier of said defendant bank or without the consent or authorization of said bank.

125 4. The court erred in finding that it is not true that said cashier had no power or authority to sell said stock under the terms and provisions of the "National Bank Act" or under any of the acts of Congress or under any of the provisions of law.

5. The court erred in declining to hold or find that said cashier had no authority to make said purported sale under the terms and provisions of the "National Bank Act," or under the acts of Congress, or under any of the provisions of law.

6. The court erred in finding that said Charles E. Palmer, as such cashier, at all or any of the times mentioned in said findings possessed full power and authority to make such sale on behalf of said defendant bank.

7. The court erred in finding that said sale was a valid act of said defendant bank.

8. The court erred in finding that said sale was or is binding upon said defendant bank.

II.

Insufficiency of the Evidence.

The defendants hereby specify the following particulars
126 in which the evidence was and is insufficient to justify the decision. The evidence was and is insufficient to justify the decision in each and every of the following particulars, to-wit:

1. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding of the court that said cashier acting for said defendant bank sold said shares of stock to plaintiff, George McBoyle, for the sum of Eleven thousand Dollars ($11,000.00) or otherwise sold said shares or at all.

2. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that said cashier acted for said defendant bank in making said purported sale.

3. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that said cashier, Charles E. Palmer, in making said sale did not act beyond his power of authority as cashier of said defendant bank.

4. The evidence shows and establishes that said cashier, Charles E. Palmer, in making said purported sale, acted beyond his power and authority, and beyond his authority as cashier of said defendant bank.

127 5. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that said cashier, Charles E. Palmer, in making said sale did not act without the consent or authorization of said defendant bank.

6. The evidence shows and establishes that in making said purported sale said cashier, Charles E. Palmer, acted without the consent or authorization of said defendant bank.

7. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that it is not true that said cashier had no power or authority to sell said stock under the terms and provisions of the "National Bank Act" or under any of the acts of Congress or under any provisions of law.

8. The evidence shows and establishes that it is true that said cashier had no power or authority to sell said stock under the terms

or provisions of the "National Bank Act" or under any of the acts of Congress or under any provision of law.

9. The evidence shows and establishes that said cashier had no power or authority to sell said stock under the terms or provisions of the "National Bank Act" or under any of the acts of Con-
128 gress or under any provision of law.

10. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that said Charles E. Palmer as such cashier at all of said times possessed full power and authority to make such sale on behalf of said defendant bank.

11. The evidence shows and establishes that said Charles E. Palmer as such cashier or otherwise at any time possessed full or any power or full or any authority to make such sale on behalf of said defendant bank.

12. The evidence was and is insufficient to establish or sustain and the evidence fails to establish or sustain the finding that said sale was the valid act of said defendant bank and was and is binding upon it.

13. The evidence shows and establishes that said sale was not a valid act of said defendant bank and that said sale was not and is not binding upon said defendant bank.

129 III.

The Decision is Against the Law.

The defendants hereby specify the following particulars in which the decision is against the law.

Said decision is against the law in each and every of the particulars wherein the evidence is specified under assignment No. 11 hereof to be insufficient to justify the decision and defendants hereby refer to each and every of its specifications of insufficiency of evidence to justify the decision set forth under said assignment of error No. 11 and make the same and each and all of them a part of this assignment of error with the same force and effect as if herein set forth.

Said decision is against the law in this that said findings of fact of the court are incomplete.

Said decision is against the law in this that said findings of fact are conflicting and contradictory.

And now within the time required by law as duly and regularly extended by counsel defendants present this their proposed
130 bill of exceptions to be used on their appeal from the judgment made and entered in the above entitled cause and pray that the same may be settled and allowed.

Dated: March 26th, 1914.

LEON A. CLARK,
FITZGERALD & ABBOTT,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Defendants.

Stipulation.

The foregoing bill of exceptions is hereby agreed to as correct and may be settled as such by the judge and filed herein.

Dated: March 26th, 1914.

T. C. COOGAN,
WILLIAM H. ORRICK,
POWELL & DOW,
Attorneys for Plaintiffs.
LEON A. CLARK,
FITZGERALD & ABBOTT,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Defendants.

131 *Order.*

The foregoing bill of exceptions is hereby settled and allowed this 8th day of April, 1914.

WM. S. WELLS,
Judge of the Superior Court, Who Tried said Cause.

[Title of Court and Cause.]

Notice of Appeal from Judgment.

To the Clerk of the Above-entitled Court and to the Plaintiffs in the Above-entitled action, and to T. C. Coogan, Esq., Messrs. Powell & Dow, and William H. Orrick, Esq., Their Attorneys:

You and each of you will please take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of California, from the judgment herein made on the 6th day of November, 1913, and the whole thereof, in favor of the plaintiffs and against the defendants, which said judgment is entered in book 98 of judgments at page 249 thereof.

132 Dated: January 5th, 1914.

LEON A. CLARK,
FITZGERALD & ABBOTT,
FITZGERALD, ABBOTT & BEARDSLEY,
Attorneys for Defendants and Appellants.

[Endorsed:] Due service of the within notice of appeal admitted by copy this 5th day of January, 1914. T. C. Coogan, Powell & Dow, W. H. Orrick, Attorneys for Plaintiffs. Filed Jan. 5, 1914. John P. Cook, Clerk, by W. W. Manning, Deputy Clerk.

Stipulation to Transcript.

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all the papers

therein set forth now on file in the office of the county clerk of Alameda county, state of California; that the minute orders therein contained are full, true and correct copies thereof as made and as entered in the minutes of the Superior Court; that the said
133 foregoing papers shall constitute the transcript on the appeal from the judgment; that a sufficient undertaking on appeal from the judgment, in due form of law, has been properly filed in said cause in the manner and within the time required by law. That the appeal from the said judgment may be heard and determined upon the foregoing transcript.

Dated, April —, 1914.

FITZGERALD, ABBOTT & BEARDSLEY,
LEON A. CLARK,
Attorneys for Appellants.
Attorneys for Respondents.

Clerk's Certificate to Transcript.

STATE OF CALIFORNIA,
County of Alameda, ss:

I, John P. Cook, county clerk of the County of Alameda, State of California, and ex-officio clerk of the Superior Court in and for said county, hereby certify that I have compared the foregoing transcript with the original papers in said action, now on file in my office, and with the orders therein made and entered on the minutes
134 of said court, and that the papers and orders therein contained are full, true and correct copies of the originals on file in this office, and of the whole thereof.

I further certify that a sufficient undertaking on appeal from the judgment, in due form of law, has been properly filed in said cause, in the manner and within the time required by law; and that the erasures and interlineations appearing in the foregoing transcript were made before certifying hereto.

In witness whereof I have hereunto set my hand and affixed the seal of said Superior Court this — day of April, 1914.

[SEAL.]

JOHN P. COOK,
County Clerk,
By —— ——,
Deputy Clerk.

135 (S. F., No. 5628. In Bank. March 2, 1912.)

GEORGE MCBOYLE et al., Appellants,
v.
UNION NATIONAL BANK (a Corporation) and H. N. Morris, as Receiver, etc., Respondents.

The Court: Upon further consideration of this case, after a rehearing before the court in Bank, we are satisfied that the conclusion reached by the court in Department is correct. In the opinion of Mr. Justice Sloss, there rendered, it is said that the National Bank-

ing Act does not give a national bank "power to deal in stocks or bonds." The question of the right or power to deal or invest in bonds is not involved. The words "or bonds," in the passage quoted, and subsequently, are surplusage and are stricken from the opinion. As thus amended the opinion of the court in Department is adopted as the opinion of the court in Bank.

The judgment and order denying a new trial are reversed.

The Department opinion as thus amended is as follows:

"The action was brought to recover from the Union National Bank 599 shares of the capital stock of Burnham-Standeford Company, a corporation. The complaint alleged that these shares, represented by Certificate No. 59, were on January 3, 1907, owned by and in the possession of plaintiff Lulu May McBoyle, that she had then pledged them to the bank to secure the promissory note of George McBoyle, her husband, for $9,500, and that she had thereafter tendered to the bank the amount due on the note and demanded re-delivery of her stock, which had been refused. The answer of the bank denied that plaintiff Lulu May McBoyle was the owner or in possession of said shares, or that she had pledged them to the bank. There was also an affirmative defense, in which the bank alleged that it had, for many years prior to January 3, 1907, been the owner of the 599 shares of stock, that on that day George McBoyle had made an offer to Charles E. Palmer, the cashier
136 of the bank, to buy said stock for $11,000, $1,500 in cash and $9,500 on his promissory note, such note to be secured by a pledge of the stock. Palmer accepted the offer, and the transaction was carried out on these lines. There are averments that McBoyle misled Palmer by fraudulent misrepresentations regarding the value of the stock, but as there was no evidence to sustain these charges, and the court found against them, we need not notice them further. It was alleged that Palmer acted beyond his authority in attempting to make the sale, that the bank, upon learning the facts, promptly repudiated the transaction, and tendered to McBoyle the $1,500 received by it, with interest, and his note for $9,500. The tender was refused, whereupon the bank made a deposit of the money and the note in McBoyle's name, pursuant to Civil Code section 1500.

"Morris, who had been appointed receiver of the bank pending the action, was joined as a party defendant, and by agreement of the parties, the answer of the bank stood as his answer.

"The findings were in favor of the defendants on all the issues except that of fraud, and judgment went for them. The plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

"Various points are raised, but we think it will be unnecessary to consider anything beyond the attack by appellants upon the finding that Palmer exceeded the scope of his authority as cashier in undertaking to sell the stock in question. In view of the findings negativing fraud, the only ground upon which the bank could repudiate the sale to McBoyle, and the subsequent pledge, was the want of authority in Palmer to sell. If, in law and in fact, he had such
137 authority, title to the stock passed by the sale, and the pledgor was entitled, upon tender of the amount for which he had pledged the shares, to a return of the certificate.

"The powers of the cashier of the defendant bank were defined in its by-laws, a part of which read as follows: "The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange and to issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. * * *

"The extent of the authority of a bank cashier has been considered in many cases. Generally speaking, he has 'greater inherent powers than any other corporate officer.' (2 Cook on Corporations. sec. 718.) He has 'full charge of the bank's personal property, except so far as withdrawn from his control by the bank or by the directors.' (Morse on Banking, sec. 157; Wild v. Bank, 3 Mason, 505, (Fed. Cas. No. 17,646.) He is the 'executive officer, through whom the whole financial operations are conducted.' (First Natl. Bank v. Greenville etc., Co., 24 Tex. Civ. App. 645, (60 S. W. 828). That he may negotiate and transfer, on behalf of the bank, negotiable paper owned by it is universally held. (Morse on Banking, sec. 158.)

"The respondents contend, however, that the authority of the cashier, as such, does not extend to the disposition of the real property belonging to the bank, or of any personal property so belonging, other than negotiable paper. At the same time it is conceded that he has power to sell property mortgaged or pledged to the bank, as a means of collecting a debt due it. If we assume the correctness of these propositions, what is the basis of the distinction between
138 a sale of property owned generally, and a sale of property held under mortgage or pledge to secure the payment of a debt? Undoubtedly it is that acts which are beyond the scope of the ordinary business of the bank, acts, that is to say, which call for the exercise of judgment or discretion affecting the policy to be pursued, are to be performed by or under the mandate of the directors, while acts which are included in the ordinary business are properly to be done by the cashier. The latter class of transactions is the one comprised in the provision of the by-laws of this bank, authorizing the cashier to do 'whatever may be necessary in the management of the business of the bank.' The sale of property held by the bank for investment or similar purposes is not a part of the ordinary business of the bank. On the other hand, the collection of debts due it is clearly a part of its ordinary business, and hence such collection, together with any acts incidental or necessary to such collection, may properly be carried on by the cashier under his inherent authority.

"If we apply this rule to the situation disclosed by the record in the case at bar, we cannot doubt that the sale of the stock in question was within the scope of Palmer's authority as cashier. The 599 shares of the stock of Burnham-Standeford Company had originally been pledged to the Union National Bank as security for a loan. After so holding them for some years, the bank, in 1904, acquired

the legal title to the stock by virtue of a sale made in proceedings in insolvency brought against the pledgor. The defendant bank was organized under the act of Congress as a national bank. As such, it had no powers beyond those specified in the act under which it existed, and such powers as were necessarily incident to those
139 expressly given. The act does not give power to deal in stocks, nor is such power incidental to any of the functions conferred. (2 Morse on Banking, p. 1310; Weckler v. Bank, 42 Md. 581, (20 Am. Rep. 95); First Natl. Bank v. Natl. Exch. Bank, 39 Md. 600; First Natl. Bank v. Natl. Exch. Bank, 92 U. S. 122, (23 L. Ed. 679). By this is meant, not that a national bank may not take title to stocks in compromise of a disputed or doubtful claim, or take them in pledge, or purchase them with a view to protecting or satisfying a claim secured by such pledge. The taking in each of such cases would be merely incidental to the business of making loans, etc., for which the bank is organized. What is prohibited is the purchase for speculation or investment, or the purchase and sale on commission. It would follow that where a national bank had bought stock pledged to it, its duty would be to dispose of such stock as soon as a sale could, to proper advantage, be made. In fact, in this case there was evidence that the national bank examiners had criticised the defendant bank for retaining this stock so long. The only proper purpose of taking the stock was to enable the bank to realize upon its loan. The resale of such stock may properly be regarded as one of the steps taken in the process of collection. A sale under these circumstances was, therefore, we think, a part of the ordinary business of the bank, or to use the language of the by-laws, it was an act 'necessary in the management of the business of the bank.' As such, it was within the powers of the cashier.

"The judgment and the order denying a new trial are reversed."

140 S. F., No. 6976. In Bank. July 24, 1914.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs and Respondents,

v.

UNION NATIONAL BANK (a Corporation) and H. N. MORRIS, as Receiver of said Union National Bank (a Corporation), Defendants and Appellants.

[1] Banking Law—Sale of Stock Acquired under Pledge—Authority of Bank Cashier—Affirmance of Opinion on Former Appeal.—It is held on this appeal from a judgment declaring the plaintiff to be the owner of certain shares of corporate stock which she had purchased from the cashier of a national bank and to which the bank had acquired ownership at a pledgee's sale of the stock, that the reasoning on the former appeal (162 Cal. Rep. 277) that the cashier had authority to sell the stock, is adopted as the opinion on the present appeal.

Appeal from the Superior Court of Alameda County—Wm. S. Wells, Judge.

For Appellants—Fitzgerald, Abbott & Beardsley; Fitzgerald & Abbott; Leon A. Clark.

For Respondents—T. C. Coogan; Powell & Dow; W. H. Orrick.

By the Court:

The defendants appeal from a judgment declaring the plaintiff Lulu May McBoyle to be the owner of 599 shares of the capital stock of Burnham-Standeford Company, a corporation, and of the certificate representing such shares, and adjudging that said plaintiff recover the 599 shares and certificate upon payment to the defendant receiver of the sum of $9,500.00 with interest.

The case has already been before this court on appeal. Upon a first trial, judgment had gone in favor of the defendants. The plaintiffs made a motion for a new trial, which was denied. This court, on March 2, 1912, rendered its judgment reversing the judgment below, as well as the order denying a new trial. The essential facts are stated in our opinion on the former appeal, reported in 162 Cal. Rep., at page 277.

When the cause came before the superior court for a second trial, the defendant, with the leave of the court, filed an amended answer. This pleading did not, however, change the issues in any respect material to the questions now presented.

At the trial, the cause was, by stipulation, submitted upon the evidence taken at the first trial, together with the further stipulated fact that a certain witness, if called, would have testified that the stock in controversy, "at all times after its purchase by

said defendant, Union National Bank, was carried on its books in the bond investment account." We are satisfied that this additional testimony could not have had any substantial bearing upon the main issue in dispute, and, in fact, the contrary is not seriously urged here.

[1] The fundamental question in the case is whether the cashier of the defendant bank had authority to sell the shares of stock to McBoyle. Upon the first trial the superior court found that the cashier had exceeded his authority in making the sale. The
141 holding of this court was that this finding was not sustained by the evidence. Upon the second trial, the court below, following the conclusions reached by us, found in favor of the plaintiffs on this issue. The judgment entered upon such finding (together with the findings, not now assailed, on other issues) must be affirmed, unless we conclude that we erred in our former decision regarding the extent of the cashier's authority. We see no reason for changing the views heretofore expressed, if, indeed, any such change were not precluded by the doctrine of the "law of the case." The grounds of our action are fully stated in the opinion on the earlier appeals, and the reasoning of that opinion is adopted as the basis of the present decision.

The judgment is affirmed.

(Beatty, C. J., does not participate in the foregoing.)

142 In the Supreme Court of the State of California.

S. F., No. 6976.

M.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,

vs.

UNION NATIONAL BANK, a Corporation, and CLAUD GATCH, Substituted for H. N. Morris as Receiver of said Union National Bank, a Corporation, Defendants.

Petition for Writ of Error.

Considering themselves aggrieved by the final decision of the Supreme Court of the State of California in rendering judgment against them in the above entitled case, defendants hereby pray a writ of error from said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

R. M. FITZGERALD,
CARL H. ABBOTT,
CHARLES A. BEARDSLEY,
Attorneys for Defendants.

STATE OF CALIFORNIA,
Supreme Court, ss:

Let the Writ of Error issue without the execution of any bond, same having been expressly waived by stipulation filed in the above entitled court.

Dated April 2nd, 1915.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

143 [Endorsed:] Original. S. F., No. 6976. In the Supreme Court. City & County of San Francisco, State of California. George McBoyle et al., Plaintiffs, vs. Union National Bank, etc., et al., Defendants. Petition for Writ of Error. M. Filed Apr. 2, 1915. B. Grant Taylor, Clerk Supreme Court. M. Fitzgerald, Abbott & Beardsley, Oakland Bank of Savings Bldg., Oakland, California, Attorneys for Defendants.

144 In the Supreme Court of the State of California.

S. F., No. 6976.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,
vs.
UNION NATIONAL BANK, a Corporation; CLAUD GATCH, Substituted for H. N. Morris, as Receiver of said Union National Bank, a Corporation, Defendants.

Assignment of Error.

Now come the above named defendants, and in connection with their writ of error filed herewith, make the following assignment of errors, which they aver occurred at the trial of said cause, to-wit:

First. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the Cashier of the said defendant Union National Bank, a National Banking Association organized under the provisions of the "National Bank Act," had authority under the provisions of said act, and without the consent or authorization of the Board of directors of said bank, to sell corporate stock owned and held by said bank and carried by it as an investment on its books in its bond and investment account.

Second. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the board of directors of said defendant Union National Bank, had not the authority under the provisions of said "National Bank Act" to sell or direct the sale of
145 corporate stock owned and held by said bank and carried by said bank on its books as an investment in its bond and investment account.

Third. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the board of directors of said defendant Union National Bank, had not the authority under the provisions of said "National Bank Act" to repudiate the sale attempted to be made by the Cashier of said bank of corporate stock owned and held by said bank and carried by said bank on its books as an investment in its bond and investment account.

For which errors the defendant Union National Bank, a corporation, and Claud Gatch, substituted for H. N. Morris, as Receiver of the said Union National Bank, a corporation, pray that the judgment of said Supreme Court of the State of California, dated July 24th, 1914, be reversed, and a judgment be entered for the defendants and for costs.

R. M. FITZGERALD,
CARL H. ABBOTT, AND
CHARLES A. BEARDSLEY,
Attorneys for Union National Bank, a Corporation, and Claud Gatch, Substituted for H. N. Morris, as Receiver of the Union National Bank, a Corporation.

146 [Endorsed:] No. 6976. Dept. ——. In the Supreme Court. City & County of San Francisco, State of California. George McBoyle et al., Plaintiffs, vs. Union National Bank, etc., et al., Defendants. Assignment of Error. Filed Apr. 2, 1915. B. Grant Taylor, Clerk, by Dryden, Deputy. Fitzgerald, Abbott & Beardsley, Oakland Bank of Savings Bldg., Oakland, California, Attorneys for Defendants.

147 *Writ of Error.*

6976.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of California:

Because in the records and proceedings, as also the rendition of a judgment in a plea, which is in the Supreme Court of California before you, decided July 24th, 1914, between George McBoyle and Lulu May McBoyle, plaintiffs versus Union National Bank, a corporation, and Claud Gatch, substituted for H. N. Morris, as Receiver for said Union National Bank, a corporation, defendants, a manifest error has happened to the great damage of the said defendants, as by their complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together

with this writ, so that you have the said records and proceedings aforesaid at the City of Washington, D. C. and filed in the office of the Clerk of the United States Supreme Court on or before sixty days from date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

148 Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States this 2nd day of April, 1915.

Done in the City of San Francisco, with the seal of the District Court of the United States for the Northern District of California attached.

[Seal of the U. S. District Court, Northern Dist. of California.]

WALTER B. MALING,
Clerk of the District Court of the United States,
Northern District of California.

Allowed:
F. M. ANGELLOTTI,
Chief Justice of the Supreme Court
of the State of California.

149 [Endorsed:] In the Supreme Court of the United States. S. F., 6976. Union National Bank, a corporation, Claud Gatch, substituted for H. N. Morris, as Receiver of said Union National Bank, a corporation, plaintiffs in error, vs. George McBoyle and Lulu May McBoyle, defendants in error. Writ of Error. Filed Apr. 2, 1915. B. Grant Taylor, Clerk Supreme Court. Dryden. R. M. Fitzgerald, Carl H. Abbott, Charles A. Beardsley, Oakland, California, Attorneys for Defendants.

150 *Citation and Service Thereof.*

6976.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George McBoyle and Lulu May McBoyle, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of California, wherein Union National Bank, a corporation and Claud Gatch, substituted for H. N. Morris, as receiver of said Union National Bank, a corporation, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of California, this 2nd day of April, 1915.

F. M. ANGELLOTTI,
Chief Justice of the Supreme Court of the State of California.

Attest:

[Seal Supreme Court of California.]

B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

SAN FRANCISCO, CAL., April 2nd, 1915.

We attorneys of record for the defendants in error in the above entitled case hereby acknowledge due service of the above cita-
151 tion and enter an appearance in the Supreme Court of the United States.

T. C. COOGAN,
W. H. ORRICK,
POWELL & DOW,
Attorneys for George McBoyle and Lulu May McBoyle.

152 [Endorsed:] S. F., 6976. In the Supreme Court of the United States. Union National Bank, a corporation, Claud Gatch, substituted for H. N. Morris, as Receiver of said Union National Bank, a corporation, plaintiffs in error, vs. George McBoyle and Lulu May McBoyle, defendants in error. Citation and service thereof. Filed Apr. 2, 1915. B. Grant Taylor, Clerk Supreme Court. R. R. M. Fitzgerald, Carl H. Abbott, Charles A. Beardsley, Oakland, California, Attorneys for defendants.

153 Copy.

In the Supreme Court of the State of California.

No. 6976.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,
vs.
UNION NATIONAL BANK, a Corporation, and H. N. MORRIS, as Receiver of the Union National Bank, a Corporation, Defendants.

Stipulation Respecting Bonds and Stay of Execution.

Whereas the defendants in the above-entitled action have been directed by the Comptroller of the Currency to take said action to the Supreme Court of the United States, upon a writ of error, and said defendants, under said direction, are about to take out said writ of error,

It is hereby stipulated that, pursuant to the provisions of Section 1001 of the Revised Statutes of the United States, no bond, obligation or security shall be required from said defendants, or either of them, to prosecute said suit or to answer in damages or costs.

It is further stipulated that the execution upon the judgment rendered in said action may be stayed pending the disposition of said action by said Supreme Court of the United States, and that in case of a decision adverse to said defendants, or either of them, such costs as by law are taxable against said defendants, or either of them, shall be paid out of the contingent fund of the department under whose direction said proceedings were instituted, with the same force and effect as if said direction were fully set out in the record of said action.

154 Dated: March 2, 1915.

T. C. COOGAN,
POWELL & DOW,
W. H. ORRICK, *Attorneys for Plaintiffs.*
FITZGERALD, ABBOTT & BEARDSLEY,
FITZGERALD & ABBOTT,
Attorneys for Defendants.

155 [Endorsed:] No. 6976. Dept. ——. In the Supreme Court, State of California. George McBoyle et al., Plaintiffs, vs. Union National Bank, a corporation, et al., Defendants. Stipulation respecting bonds and stay of execution. Filed Apr. 2, 1915. B. Grant Taylor, Clerk, by Dryden, Deputy. Fitzgerald, Abbott & Beardsley, Oakland Bank of Savings Bldg., Oakland, California, Attorneys for Defendants.

156 In the Supreme Court of the State of California.

6976.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,
vs.
UNION NATIONAL BANK, a Corporation, and Claud Gatch, Substituted for H. N. Morris as Receiver of the Union National Bank, Defendants.

Præcipe Indicating Portions of Record to be Incorporated Into the Transcript.

To the Clerk of the Supreme Court of the State of California:

You will please take notice that the above named defendants have obtained a writ of error to the Supreme Court of the United States from the judgment in the above mentioned case, and require you to make up a true copy of the record and of the assignment of error, and of all the proceedings of the case under your hand and the seal of the Supreme Court of the State of California, and you will further please take notice that said defendants, being the plaintiffs in error in said writ of error named, hereby indicate to you the portions of the record to be incorporated into the transcript of the record on such

writ of error in accordance with Rule 8 of the Supreme Court of the United States, as follows, to-wit:

(1) The following portions of the transcript on appeal in the above entitled case, filed in your office on the — day of
157 April, 1915:

(*a*) Folios 1 to 183 inclusive;

(*b*) Folios 184 to and including the word "follows" at the end of the 4th line in Folio 190;

(*c*) Commencing at the *wrors* "The Witness (continuing)" in the 8th line of Folio 217, to and including the word "time" in the 8th line of Folio 231;

(*d*) Folio 249, to and including the word "upon" in the second line of Folio 256;

(*e*) Commencing at the words "Defendants' counsel" in the 7th line of Folio 305, to and including all of Folio 306;

(*f*) Commencing with the wrods "On January" in the 17th line of Folio 309, to and including the word "bank" in the 7th line of Folio 316;

(*g*) Folio 330, to and including the words "paid on the 3rd" in the 1st line of Folio 335;

(*h*) Folio 357, to and including the words "Yes, sir" in the 1st line of Folio 359;

(*i*) Commencing with the sentence "Thereupon both sides rested" in the 3rd line of Folio 364, to and including the words "Attorneys for Respondents" in the 4th line of Folio 398;

(2) A copy of Assignment of Errors and Prayer for Reversal.

(3) The original petition for Writ of Error, together with its allowance.

(4) A copy of the Stipulation waiving undertakings.

(5) The original Writ of Error with the allowance thereof.

(6) Statement showing stipulation waiving undertaking
158 and a copy of Writ of Error lodged with the Clerk.

(7) The original citation with service thereon.

(8) Your return of the writ of error and statement of costs.

Dated: April 2nd, 1915.

Yours, etc.,

R. M. FITZGERALD,
CARL H. ABBOTT,
CHARLES A. BEARDSLEY,
Attorneys for Plaintiffs in Error.

159 In the Supreme Court of the State of California.

GEORGE MCBOYLE and LULU MAY MCBOYLE, Plaintiffs,
vs.
UNION NATIONAL BANK, a Corporation, and CLAUD GATCH, Substituted for H. N. Morris as Receiver of the Union National Bank, Defendants.

Præcipe Indicating Portions of Record to be Incorporated Into Transcript.

To the Clerk of the Supreme Court of the State of California:

You will please take notice that the plaintiffs, in the above-entitled action, being the defendants in error named in a writ of error to the Supreme Court of the United States from the judgment in said action, hereby indicate to you the portions of the record to be incorporated into the transcript of the record on such writ of error, in accordance with Rule 8 of the Supreme Court of the United States, to-wit, the following portions of the transcript on appeal in said action filed in your office on the — day of April, 1914:

(1) Commencing at the word "follows," at the end of the 4th line in Folio 190, to the words, "the witness (continuing)," in the 8th line of Folio 217.

(2) Commencing at the word "time," in the 8th line of Folio 231, to and including Folio 248.

(3) Commencing at the word "upon," in the 2nd line of Folio 256, to and including the word "corporation," in the 6th line
160 of Folio 305.

(4) Commencing at and including Folio 307, to and including the words "the witness (continuing,)" in the 7th line of Folio 309.

(5) Commencing at the word "bank," in the 7th line of Folio 316, to and including Folio 329.

(6) Commencing at the word "3rd," in the 1st line of Folio 335, to and including Folio 356.

(7) Commencing at the words, "Yes, sir," in the 1st line of Folio 359, to and including the words, "Thereupon, both sides rested," in the 3rd line of Folio 364.

Dated: April 14, 1915.

T. C. COOGAN,
POWELL & DOW,
W. H. ORRICK,
Attorneys for Defendants in Error.

161 [Endorsed:] S. F., 6976. In the Supreme Court of the State of California. George McBoyle and Lulu McBoyle, Plaintiffs, vs. Union National Bank, a corporation, and Claud Gatch, substituted for H. N. Morris, as Receiver of the Union National Bank, Defendants. Præcipe indicating portions of record to be incorporated into transcript. (Copy). Filed May 13, 1915. B. Grant

Taylor, Clerk Supreme Court. E. T. C. Coogan, Powell & Dow, and W. H. Orrick, attorneys for defendants in error.

162 & 163 In the Supreme Court of the State of California.

S. F., 6976.

GEORGE McBOYLE and LULU MAY McBOYLE, Plaintiffs and Respondents,

vs.

UNION NATIONAL BANK (a Corporation) and H. N. MORRIS, as Receiver of said Union National Bank (a Corporation), Defendants & Appellants.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Petition for Writ of Error, Assignment of Errors, Original Writ of Error, Original Citation with service, copies of stipulation respecting bonds and stay of execution, copy of præcipe indicating portions of record to be incorporated in transcript, Copy of Transcript, Copy of Opinion rendered March 2nd, 1912, Copy of Opinion rendered July 24th, 1914, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 30th day of April, A. D. 1915.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk*,
By I. ERB, *Deputy Clerk*.

164 In the Supreme Court of the State of California.

Bank.

San Francisco, No. 6976.

GEORGE McBOYLE et al., Pl'tffs & Resp's,

vs.

UNION NATIONAL BANK and H. N. MORRIS, as Receiver, etc., Def'ts & App'ts.

On Appeal from the Superior Court in and for the County of Alameda.

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It is ordered, adjudged, and decreed by the Court that the Judgment of the Superior Court in and for the County of Alameda in the above entitled cause, be and the same is hereby affirmed.

Respondents to recover costs of appeal.

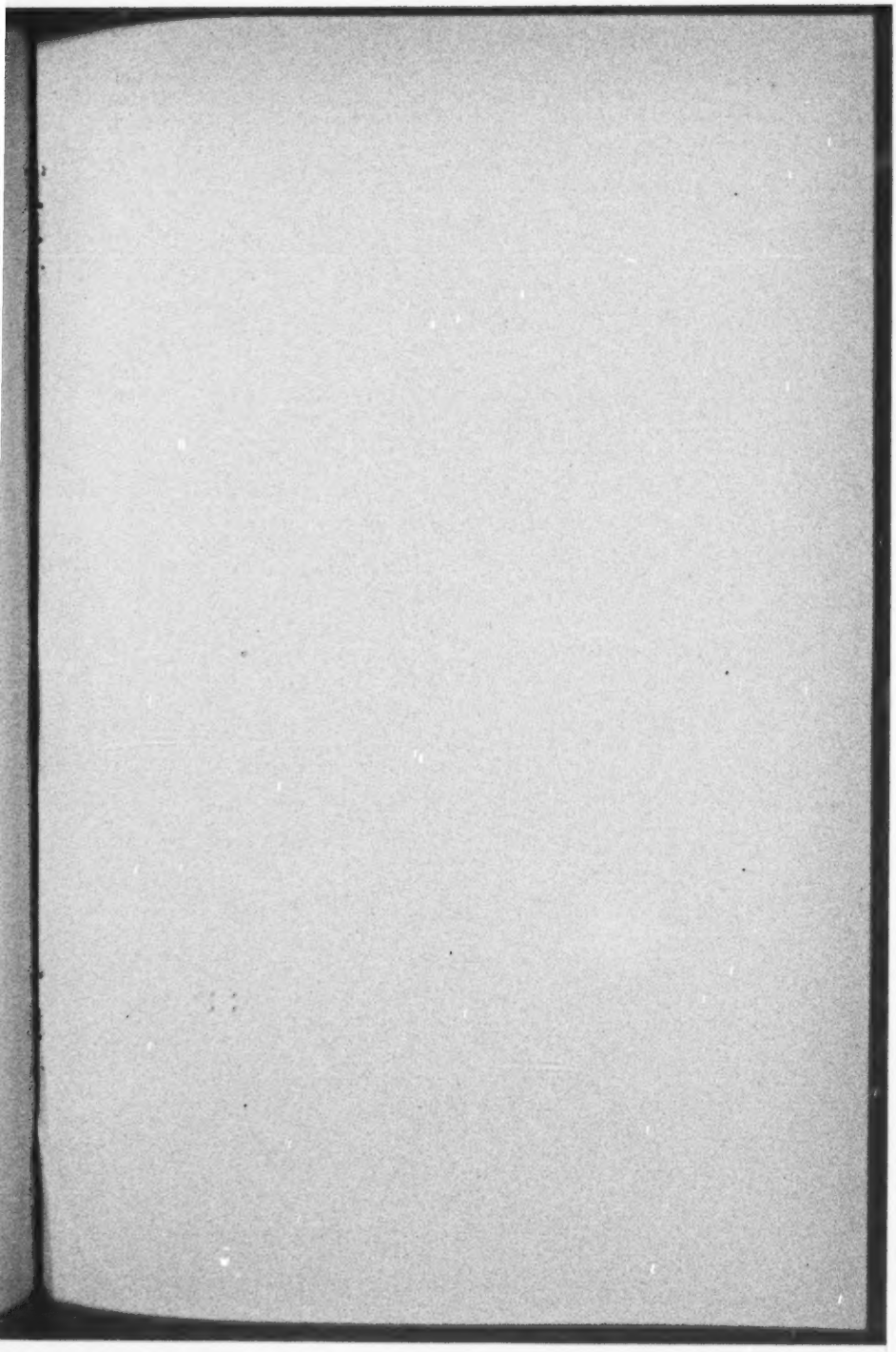
I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of formal judgment in the cause therein named, as shown by the records of my office.

Witness my hand and the Seal of the Court, this 28th day of May, A. D. 1915.

[Seal Supreme Court of California.]

B. GRANT TAYLOR, *Clerk,*
By I. ERB,
Deputy Clerk, San Francisco Office.

Endorsed on cover: File No. 24,792. California Supreme Court. Term No. 511. Union National Bank and Claud Gatch, substituted for H. N. Morris, as Receiver of said Union National Bank, plaintiffs in error, vs. George McBoyle and Lulu May McBoyle. Filed June 14th, 1915. File No. 24,792.



(24,792)

JAN 16 1917

JAMES D. MAHER
CLERK

Supreme Court

OF THE

United States

October Term 1916.

No. 164

UNION NATIONAL BANK AND CLAUD GATCH, SUBSTITUTED FOR H. N. MORRIS, AS RECEIVER OF SAID UNION NATIONAL BANK,

Plaintiffs in Error,

vs.

GEORGE McBOYLE and LULU MAY McBOYLE,

Defendants in Error.

Reply Brief for Plaintiffs in Error.

R. M. PRESCOTT,
GARO H. ARMUT,
CHARLES A. BEARDSLEY,
Attorneys for Plaintiffs in Error.
OAKLAND BANK OF SAVINGS BLDG.
OAKLAND, CALIFORNIA.

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INDEX

Pages

Opening Statement 1–2

Brief of the Argument 3–48

1. The right and immunity under the Federal statute was especially set up in time to give this court jurisdiction 2–12

Bonner v. Gorman, 213 U. S. 86, 53 L. Ed. 709 8

Capital Natl. Bank v. First Natl. Bank of Cadiz, 172 U. S. 425, 43 L. Ed. 502..... 4

Louisville and Nashville Ry. Co. v. Higdon, 234 U. S. 592, 58 L. Ed. 1484.....6, 7, 9, 10

Miedreich v. Lauenstein, 232 U. S. 236, 243, 58 L. Ed. 584, 589..... 10

Union Mutual Life Ins. Co. v. Kirchoff, 169 U. S. 103, 43 L. Ed. 677.....4, 5, 8, 10

Yazoo Rd. Co. v. Adams, 180 U. S. 1, 45 L. Ed. 395 .....4, 5, 10

2. A federal question is presented, and that federal question is decisive of this case.....12–31

(a) A federal question is involved because a federal statute is pleaded as a defense....13–15

Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492 15

Illinois Central R. Co. v. McKendree, 203 U. S. 514, 525, 526, 51 L. Ed. 298, 303..... 15

Kennedy Min. Co. v. Argonaut Min. Co., 189 U. S. 1, 47 L. Ed. 685..... 13

Missouri, etc., Rd. Co. v. Haber, 169 U. S. 613, 42 L. Ed. 878 13

Nutt v. Knut, 200 U. S. 12, 50 L. Ed. 348, 352 .....14, 15

INDEX — Cont'd.

Pages

Seaboard Airline Ry. Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062 15

St. Louis R. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179 15

Strauss v. Am. Pub. Assn., 231 U. S. 222, 58 L. Ed. 192 15

Yates v. Jones Natl. Bank, 206 U. S. 158, 67, 51, L. Ed. 1002, 1009 15

(b) It is of no consequence that the state court did not in express terms refer to the defense as one under the federal statute and did not in express terms overrule that defense 15–17

California Natl. Bank v. Kennedy, 167 U. S. 362, 42 L. Ed. 198 16

Chicago, B. and Q. R. Co. v. Illinois, 200 U. S. 561, 580–581, 50 L. Ed. 596, 604–605.. 17

Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492 16

First Natl. Bank. v. Anderson, 72 U. S. 575, 43 L. Ed. 55 16

(c) Nor did the California Supreme Court decide any non-federal issue, which was decisive of the case, independent of the federal question 17–19

Constitution of California, Art. VI, Sec. 2.. 17

Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492 18

St. Louis, etc., Ry. Co. v. McWhirter, 229 U. S. 265, 57 L. Ed. 1179 18

(d) The question as to the power of the cashier of a national bank is itself a federal question and a ruling on that question is decisive of this case.....19–24

INDEX — Cont'd.

Pages

California Natl. Bank v. Kennedy, 167 U. S. 366, 43 L. Ed. 198.....19, 23

Clement Natl. Bank v. Vermont, 231 U. S. 120, 140, 58 L. Ed. 147, 157..... 20

Cooper v. Hill, 94 Fed. 582, 586..... 19

Logan Co. Natl. Bank v. Townsend, 139 U. S. 67, 35 L. Ed. 107..... 20

Walker v. Windsor National Bank, 56 Fed. 76, 80 21

(e) Primarily the statute places all the powers of national banks in the board of directors 24–31

By-laws of Union Natl. Bank, Art. VI..... 27

Rev. Stats. U. S., Sec. 5133..... 29

Rev. Stats. U. S., Sec. 5136.....24, 25, 26

Rev. Stats. U. S., Sec. 5145.....24, 25, 27

3. The cases dealing with what is a federal question, cited in the brief of defendants in error, are not in point.....31–35

American Natl. Bank v. Tappan, 174 Fed. 431, 433 32

Capital Natl. Bank v. First Natl. Bank of Cadiz, 172 U. S. 425, 43 L. Ed. 502..... 33

Chemical Natl. Bank v. City Bank of Portage, 160 U. S. 646, 40 L. Ed. 568..... 34

Conde v. York, 168 U. S. 642, 42 L. Ed. 611 32

Crary v. Devlin, 23 L. Ed. 510..... 32

Ex Parte Jones, 164 U. S. 691, 41 L. Ed. 601 31

Leather Mfg. Co. v. Cooper, 120 U. S. 778, 30 L. Ed. 816..... 31

Le Sassier v. Kennedy, 123 U. S. 521, 31 L. Ed. 262 33

INDEX — Cont'd.

Pages

Leyson v. Davis, 170 U. S. 36, 42 L. Ed. 939 33

Millingar v. Hartupee, 6 Wall. 258, 18 L. Ed. 829 32

Petriv. Comml. Bank, 142 U. S. 644, 35 L. Ed. 1144 31

4. Under the local rule of practice, the claims of ratification, estoppel and like matters, cannot be considered because of the absence of findings thereon 35–38

California Civil Code, Sec. 642..... 37
Estate of Yoeli, 164 Cal. 540, 129 Pac. 999 37
Goetz v. Goldbaum (Cal.) 57 Pac. 646..... 37

5. The claims of defendants in error that any extraordinary powers were conferred on the cashier, and that the directors ratified the attempted sale and that the bank was estopped by the purported pledge, are each and all of them without merit.....38–48

Baldwin Fertilizer Co. v. Thompson, 106 Ga. 480, 32 S. E. 591..... 47

Clark & Styles "Law of Agency," p. 328.. 47

Constitution of California, Art. VI, Sec. 2.. 43

31 Cyc. 1268–1269 46

31 Cyc. 1275–1276 43

31 Cyc. 1277–1278 43

Hannah v. Steinman, 159 Cal. 142, 112 Pac. 1094 43

Mechem on Agency, Sec. 149, p. 96..... 46

(24,792)

Supreme Court

OF THE

United States

October Term 1915.

No. 511.

UNION NATIONAL BANK AND CLAUD GATCH, SUBSTITUTED FOR H. N. MORRIS, AS RECEIVER OF SAID UNION NATIONAL BANK,

Plaintiffs in Error,

vs.

GEORGE McBOYLE and LULU MAY McBOYLE,

Defendants in Error.

Reply Brief for Plaintiffs in Error.

The fact that counsel for defendants in error have argued several propositions that are not touched upon in the brief already filed on behalf of plaintiffs in error, would seem to justify a reply on behalf of plaintiffs in error to the new matter set forth in the brief for defendants in error.

Without repeating the argument or again referring to the authorities cited in our brief already on

file, we desire to present herein, in answer to the new matter contained in the brief for defendants in error, the following propositions:

1. The right and immunity under the federal statute was especially set up *in time* to give this court jurisdiction;

2. A federal question is presented, and that federal question is decisive of this case;

3. The cases dealing with what is a federal question, cited in the brief of defendants in error, are not in point;

4. Under the *local rule of practice,* the claim of ratification, estoppel, and like matters, cannot be considered because of the absence of findings;

5. The claim of defendants in error that any *extraordinary powers* were conferred on the cashier, and that the directors *ratified* the attempted sale, and that the bank was *estopped* by the purported pledge, are each and all without merit, even if they could be considered under the local rule of practice.

We shall present these propositions in the order named.

---

1. THE RIGHT AND IMMUNITY UNDER THE FEDERAL STATUTE WAS ESPECIALLY SET UP IN TIME TO GIVE THIS COURT JURISDICTION.

In the next portion of the brief we shall present our reasons for believing that a federal question is presented by the ruling as to the inherent power

of the cashier of a national bank, whether that ruling is based on the general law applicable to all bank cashiers or on the express terms of the National Bank Act, and why we believe that a decision of that federal question is decisive of this case.

But, inasmuch as defendants in error have suggested in their brief (pages 20, 21) that the right and immunity under the statute was not set up and claimed in time to give this court jurisdiction under section 237 of the Judicial Code, we deem it proper to consider that suggestion at this time.

Plaintiffs in error denied the power of their cashier in their original answer (Tr. fol. 10); but they did not mention the "National Bank Act" until the amended answer filed by leave of court (Tr. fol. 42) after the reversal of the judgment by the Supreme Court on the first appeal, and before the second trial. In this amended answer the plaintiffs in error alleged that the defendants in error could not recover because of the same want of authority in the cashier which had been alleged in the original answer, and alleged further "that said cashier had no power or authority to sell said stock under the terms and provisions of the 'National Bank Act' or under any of the acts of Congress or under any provisions of law, or otherwise or at all" (Tr. fol. 44).

The trial court gave leave to file this amended answer; the case was tried, and the trial court decided the case against plaintiffs in error, expressly finding against the right and immunity claimed under the statute of the United States (Tr. fols. 54,

55). The plaintiffs again "especially set up and claimed" the right and immunity under the statutes of the United States in the bill of exceptions (California Civil Code, Sec. 650, 950), prepared and settled in the trial court for use on appeal to the State Supreme Court and used in that court, as provided by the local rules of practice (Tr. fols. 125, 127, 128, 129). The Supreme Court affirmed the judgment against plaintiffs in error, basing its decision on the ground that the cashier had inherent authority to make the sale (Tr. fol. 140, 141).

In support of the suggestion that the right and immunity was not reasonably set up or claimed, defendants in error, on page 21 of their brief, cite *Yazoo Rd. Co.* v. *Adams,* 180 U. S. 1; 45 L. Ed. 395; *Union Mutual Life Ins. Co.* v. *Kirchoff,* 169 U. S. 103, 42 L. Ed. 677; and *Capital National Bank* v. *First National Bank of Cadiz,* 172 U. S. 425, 43 L. Ed. 502.

Capital National Bank v. *First National Bank of Cadiz, supra,* simply stands for the proposition, as stated in the opinion of Mr. Chief Justice Fuller, that where no federal question was "asserted in terms save in the application to the Supreme Court for a rehearing, . . . the suggestion came too late." As in the present case the question was in terms raised before the second trial and before the final decision by the State Supreme Court, the case cited can have no application.

Yazoo Rd. Co. v. *Adams,* 180 U. S. 1, 45 L. Ed. 395, is more nearly in point, but it falls far short of

presenting a case parallel to the present one. One essential difference between that case and this is that in that case the *state supreme court refused to consider* the case on the second appeal. This court says (page 8) that the State Supreme Court by refusing to consider the case on the second appeal, "merely settled a question of *practice* which we cannot review." A further distinction is presented by the fact that here the amended answer was filed by leave of court (Tr. fol. 42), while in that case the amendments were filed without leave, and stricken out, because filed without leave. This court also said, as to that ruling, that it presented a question of practice "which cannot be inquired into here." The court further pointed out that inasmuch as the case was one of the second class of cases mentioned in section 709, it was not necessary to especially set up and claim the right under the statute at any time. Two important facts in reference to that case are readily apparent. The first is that what is there said about the amendment after reversal on the first appeal coming too late is not necessary to the decision. And the second is that that case relates to a state of facts and an application of the local rules of practice materially different from the present case.

Union Mutual Life Ins. Co. v. *Kirchoff,* 169 U. S. 103; 42 L. Ed. 577, also cited by defendants in error on page 20, was a case where on the first appeal the case was simply sent back for "the purpose of an accounting." This is pointed out in *Yazoo Rd. Co.* v. *Adams, supra,* at page 7. The state court also

pointed out that the case had simply been "remanded with directions as to the decree to be entered" (Page 108). In holding that the federal question was raised too late in that case, this court said, on page 111:

> "And as the judgment of the court (i. e., the state court on first appeal) determined the rights of the parties and left open only the amount due on the accounting, the suggestion of the disposition of a Federal question by that judgment comes too late."

In that case, the trial court refused to allow an amendment setting up the federal question. The appellate court held itself bound by the first decision, "and declined to enter on matters of defense which might have been availed of" (Page 113). This court held that, as the state court refused to decide the question raised on the second appeal, there was no such disposition of the federal question as would justify this court in taking jurisdiction.

Louisville & Nashville Ry. Co. v. *Higdon,* 234 U. S. 592, 58 L. Ed. 1484, is a more recent case than those cited by defendants in error on this point, and one where those cases are distinguished. It is very similar to the present case in that the federal question is there specially set up only after the judgment is reversed and the case sent back *for a new trial.* In both that case and this plaintiffs in error recovered judgment in the lower court on the first trial; defendants in error appealed and secured reversal, and the cases were sent back for new trials; plaintiffs in error in each case then offered amend-

ments to their answers pleading that the defense already considered on the first appeal presented a federal question; in both cases the highest court of the state upon the second appeal, without going into the matters in detail, said that they were satisfied by their former decisions and suggested that they *might* be bound by the "law of the case" as declared on the first appeal. In the *Higdon Case,* the trial court refused to permit the amendments to the answers to be filed; and in the present case the amendment was filed "by leave of court" (Tr. fol. 42). Herein seems to be the only noticeable difference in the two cases in the manner in which the federal question was presented. There is no difference in the time when it was presented or in the fact of its being decided by the state court.

Mr. Justice Day, in delivering the opinion of the court, said, on pages 597, 598:

> "Had the court of appeals put its decision upon the ground that the duty of the circuit court was simply to give effect to the judgment of the court of appeals by enforcing the rights of the parties upon the principles settled by it in its first decision, and that the attempt to inject Federal questions into the record by amended pleadings after the case was remanded did not seasonably raise Federal questions reviewable by the court of appeals, the case would be ruled by *Union Mut. L. Ins. Co.* v. *Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260, in which this court held that such attempts to raise Federal questions came too late to lay the foundation for review here. See also *Yazoo & M. Valley R. Co.* v. *Adams,* 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct.

Rep. 240; *Bonner* v. *Gorman,* 213 U. S. 86, 53 L. ed. 709, 29 Sup. Ct. Rep. 483.

> "The court of appeals of Kentucky in the opinion delivered in the second case did affirm the principle of the binding character of its first decision, but as it gave consideration to the offered amended answers in their Federal aspect, and ruled concerning them, we have concluded not to sustain the motion to dismiss, but to regard the Federal questions as so far passed upon by the court of appeals as to present a case reviewable here. *Miedreich* v. *Lauenstein,* 232 U. S. 236, 243, ante, 584, 589, 34 Sup. Ct. Rep. 309."

Bonner v. *Gorman,* 213 U. S. 86, 53 L. Ed. 709, supra, cites *Union Mutual L. Ins. Co.* v. *Kirchoff, supra,* to the point that (page 91),

> "where a Federal question is raised on a second appeal *and the state court refuses to consider it,* it comes too late." (The italics are ours).

But there is nothing in the rules of practice applicable to the California Supreme Court which prevented a decision on that question, and it did in fact decide that question. It referred to the amended answer which especially set up and claimed the right and immunity under the federal statute, and said: "This pleading did not, however, change the issue in any respect material to the questions now presented" (Tr. fol. 140). "The question now presented" was said by the court to be "whether the cashier of the defendant bank had authority to sell the shares of stock to McBoyle" (Tr. fol. 140). The court then proceeded to announce that it saw no reason for changing its views as announced on

the first appeal, and that it "adopted" the "reasoning of that opinion" as "the basis of the present decision" (Tr. fol. 141). The effect, therefore, was exactly the same as if it had expressly repeated reasoning set forth in the first opinion (Tr. fols. 135-139).

The plaintiffs in error especially set up and claimed its immunity under the federal statute, and the highest court of the state decided that the amended answer (setting up the federal statute) presented no reason for holding that the cashier did not possess the power to make the sale, and so it repeated, adopted and re-affirmed its former opinion as the basis of its final decision. This case, therefore, is parallel to the case of *Louisville & Nashville Ry. Co.* v. *Higdon, supra,* as far as concerns the question as to whether the federal question was seasonably raised and decided; and that case, rather than the two earlier cases relied upon by defendants in error, would seem to control on the question now under consideration.

On reason, as well as on authority, we submit that the federal question was seasonably raised. The statute (Judicial Code, Sec. 237) does not fix any *time* when the right or immunity must be "especially set up and claimed." All that it requires is that the decision of the highest court of the state must be against the right or immunity thus set up.

If under the local practice, or due to the circumstances of the particular case, the state court holds that it cannot decide the federal question thus set up because it is set up too late, then this court will

consider itself bound by the rule of local practice applied by the state court. Such was the situation in the cases of *Yazoo Rd. Co.* v. *Adams,* and *Union Mutual Life Ins. Co.* v. *Kirchoff, supra,* relied on by defendants in error.

But, even though the case has once been to the highest state court, if it is sent back, *not* with directions to enforce the decree of that court, but *for a new trial,* and before that new trial the state court applying its local rules of practice allows an amendment to the pleading especially setting up and claiming the right and immunity under the federal statute, and if the trial court tries and decides the issue thus raised against the right and immunity, and the party aggrieved presents that issue thus decided to the highest court of the state, and that court sustains the trial court in its decision, a federal question is thus properly presented and decided. And the fact that it *was* decided rather than *when* it was decided, is the essential element to the jurisdiction of this court under section 237 of the Judicial Code. Such we take to be the effect of the decision in the case of *Louisville & Nashville Ry. Co.*. v. *Higdon, supra.*

And that decision is fully in harmony with the earlier decisions of this court.

In the case of *Miedreich* v. *Lauenstein,* 232 U. S. 236, 243, 58 L. Ed. 584, 589, cited in the above quotation from the *Higdon* case, the opinion cites several earlier decisions of this court on the proposition that,

"Where a state court holds a Federal ques-

> tion is made before it, according to its practice, and proceeds to determine it, this court will regard the question as duly made."

The federal question that was presented to the State Supreme Court in the present case was the one relating to the inherent powers of a cashier of a bank organized under the National Bank Act. That was the question decided by the state court. In its opinion on the first appeal, the court refers to the limitations placed upon banks by the National Bank Act, and bases its decision upon its view of that act (Tr. fols. 138, 139).

This was before the right and immunity under the statute was set up, *in terms*. But even in the original answer, filed before the first trial, the defendants claimed that the cashier in attempting to make the sale "acted beyond his power and authority as cashier of defendant" and that the "cashier was without any authority to sell said stock" (Tr. fol. 10). And the trial court found and determined that the attempted sale was "beyond his power and the scope of his authority as cashier of said defendant Union National Bank either express or implied or otherwise" (Tr. fols. 23, 25, 33).

It may be true that the allegation of the *original* answer was not such an allegation as is contemplated by the terms of section 237; but there can be no doubt that the terms of the code were complied with by the *amended* answer, and that the federal question was in fact decided.

We respectfully submit that, since the federal question was presented and decided even on the first

trial and on the first appeal, and since it was especially set up and decided upon the second trial and on the second appeal, it cannot be said that this court is without jurisdiction, on the theory that the question was not seasonably raised.

We shall now present the reasons why the question presented was a federal question, and why its correct decision, either according to the principles of general law applicable to all bank cashiers, or according to the express provisions of the National Bank Act, would be determinative of this case and necessitate a reversal of the judgment of the state court.

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2. A FEDERAL QUESTION IS PRESENTED, AND THAT FEDERAL QUESTION IS DECISIVE OF THIS CASE.

Defendants in error have made no motion in this court to dismiss the writ of error on the ground that this court has no jurisdiction, or on any other ground; but they have suggested in their brief (pages 9-21) that there is no jurisdiction, and that the writ should be dismissed, because, they argue, that no federal question is here involved and because they say that if any such question *is* involved the question was not specially set up, as required by section 237 of the Judicial Code, sufficiently early in the proceedings in the state courts. We have already considered the objection that the federal question was not raised in time, and shall now consider the federal question itself.

A federal question is involved because a federal statute is pleaded as a defense.

When, under the provisions of section 237 of the Judicial Code, a right of immunity is "especially set up or claimed" under a statute of the United States, and the decision is against such right or immunity, this court has jurisdiction upon a writ of error. And this rule applies in all cases where the plaintiff in error sets up or claims in the state court that because of some statute of the United States, no judgment can be taken against him, and the state court awards judgment against him.

This rule is well stated in paragraph 1 of the syllabus to *Missouri etc. Rd. Co.* v. *Haber,* 169 U. S. 613; 42 L. Ed. 878, as follows:

> "The answer and claim made by the defendant in the state court, that an act of Congress furnished a complete defense to the action to enforce a state statute, raised a federal question; and the overruling of that defense by that court gives this court jurisdiction to review the state judgment."

That case, as appears from the syllabus, arose under the second class of cases referred to in section 709 of the Revised Statutes; but the rule has been declared to be the same in cases falling, as does the present one, within the third class of cases therein mentioned.

Thus in *Kennedy Mining Co.* v. *Argonaut Mining Co.,* 189 U. S. 1; 47 L. Ed. 685, this court held that a federal question was presented in a decision of the Supreme Court of California in favor of the plain-

tiff in a controversy over the ownership of ore, in which the defendant claimed that, under the terms of a federal statute, title passed to it through its patent.

And in *Nutt* v. *Knut,* 200 U. S. 12, 19; 50 L. Ed. 348, 352, this court states the rule, and cites many cases in support of the rule, as follows:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Sec. 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary. Such has been the view taken in many cases where the authority of this court to review the final judgment of the state courts are involved. *Logan County Nat. Bank* v. *Townsend,* 139 U. S. 67, 72; 35 L. Ed. 107, 110; 11 Sup. Ct. Rep. 496; *Dubuque & S. C. R. Co.* v. *Richmond,* 15 Wall. 3; 21 L. Ed. 118; *Swope* v. *Leffingwell,* 105 U. S. 3; 26 L. Ed. 939; *Anderson* v. *Carkins,* 135 U. S. 483, 486; 34 L. Ed. 272, 274; 10 Sup. Ct. Rep. 905; *McNulta* v. *Lockridge,* 141 U. S. 327; 35 L. Ed. 796; 12 Sup. Ct. Rep. 11; *Metropolitan Nat. Bank* v. *Claggett,* 141 U. S. 520; 35 L. Ed. 841; 12 Sup. Ct. Rep. 60; *McCormick* v. *Market Nat. Bank,* 165 U. S. 538, 546; 41 L. Ed. 817, 820; 17 Sup. Ct. Rep. 433; *California Nat. Bank* v. *Kennedy,* 167 U. S. 362; 42 L. Ed. 198; 17 Sup. Ct. Rep. 831. We perceive no sufficient reason for modifying our views expressed in those cases as to our jurisdiction."

It will be observed that many of the cases cited in the above quotation were national bank cases, where the statute relied upon as a defense to the action

was the National Bank Act. A later case also applying the rule to a plea of the National Bank Act is *Yates* v. *Jones National Bank,* 206 U. S. 158, 167; 51 L. Ed. 1002, 1009. Other cases decided since *Nutt* v. *Knut, supra,* and announcing the rule as applied to the plea of other federal statutes, are, *Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514, 525, 526; 51 L. Ed. 298, 303; *Seaboard Airline Ry. Co.* v. *Horton,* 233 U. S. 492; 58 L. Ed. 1062; *St. Louis R. Co.* v. *McWhirter,* 229 U. S. 265; 57 L. Ed. 1179; *Straus* v. *American Publishing Assn.,* 231 U. S. 222; 58 L. Ed. 192; *Ferris* v. *Frohman,* 223 U. S. 424; 56 L. Ed. 492.

In view of the foregoing decisions of the court, and more that could be cited, we take it that it is established, *prima facie* at least, that this court has jurisdiction of the present case, by reason of the defense that no judgment could be rendered against the present plaintiffs in error on account of the provisions of the National Bank Act, and the rendition of final judgment by the State Supreme Court.

It is of no consequence that the state court did not in express terms refer to the defense as one under the federal statute and did not in express terms overrule that defense.

Nor is it of consequence, if the state court, as suggested in the brief for defendants in error, placed its decision as to the authority of the bank cashier on general rules claimed to be applicable to all bank cashiers, of state as well as of national banks.

First National Bank v. *Anderson,* 172 U. S. 575; 43 L. Ed. 55 (on writ of error to a state court) was an action against a national bank for the conversion of certain collaterals, which defendant in error alleged the bank agreed to sell for him; the bank defended upon the ground that it was prohibited by the National Bank Act from making such a contract, and that such prohibition exempted it from all liability by reason of the transaction. This court held that, although the state court decided the case on general principles of law independent of the statute, the judgment against the bank presented a federal question under section 709 of the Revised Statutes.

So in *California National Bank* v. *Kennedy,* 167 U. S. 362, 42 L. Ed. 198, although the California Supreme Court (101 Cal. 495) held the National Bank liable as a stockholder in a savings bank by a consideration and application of principles of estoppel said by it to be applicable to all corporations that had without authority purchased stock in another corporation, this court refused to dismiss the writ of error, and reversed the judgment of the state court.

So in *Ferris* v. *Frohman,* 223 U. S. 424; 56 L. Ed. 492, (on writ of error to the Supreme Court of Illinois), in answer to the motion to dismiss the writ on the ground that the state court decided the case on common law principles, this court said on page 431:

> "The fact that the court reached its conclusion in favor of complainants by a considera-

> tion on common law principles, of their property in the original play, does not alter the effect of the decision. . . . The decision thus denied to him (the plaintiff in error) a federal right specially set up and claimed, within the meaning of Sec. 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). This court therefore has jurisdiction."

In *Chicago B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561, 580-581; 50 L. Ed. 596, 604-605, this court said:

> "But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced would require a judgment different from the one resting upon some ground of local or general law. . . . And that result could not be avoided merely by silence on the Federal question, and by placing the judgment on some principle of the common law."

Nor did the California Supreme Court decide any non-federal issue, which was decisive of the case, independent of the federal question.

An examination of the opinions of the state court (Tr. fols. 135-141) will disclose that no question was considered, and no reason given for the decision, except that the cashier, by virtue of his office, had authority to sell the 599 shares of stock of the Burnham-Standeford Company.

Owing to the provision of the California Constitution (Art. VI, sec. 2) that all decisions of the

Supreme Court "shall be in writing, *and the grounds of the decision shall be stated,*" there is no chance for speculation as to any grounds for the decision, other than the one ground stated by the court.

But even in the absence of any similar provision of local law, this court has held that "*mere conjecture will not be indulged in* for the purpose of concluding" that a state court decided a case of a non-federal point.

In *St. Louis etc. R. Co.* v. *McWhirter,* 229 U. S. 265; 57 L. Ed. 1179, cited with approval in *Seaboard Air Line Ry.* v. *Horton,* 233 U. S. 492, to the point that a federal question was involved and properly raised, and decided in the state court, this court (speaking through Mr. Chief Justice White) said on page 276:

> "The mere ruling that there was evidence sufficient to authorize consideration of the case from the point of view of negligence alone affords no basis for saying that the case was decided on such ground. *Mere conjecture may not be indulged in* for the purpose of concluding that because there was a potentiality of considering the case from a non-Federal point of view, therefore it was considered and decided in that aspect. But it was long since pointed out in *Neilson* v. *Lagow,* 12 How. 98; 13 L. Ed. 909, the court speaking through Mr. Justice Curtis, that to admit that the authority to review the action of a state court where it has decided a Federal question can be rendered unavailing by a suggestion 'that the court below may have rested its judgment' on a non-Federal ground, would simply amount to depriving this court of all power to review Fed-

> eral questions if only a party chose to make such a suggestion."

The question as to the power of the cashier of a national bank is itself a federal question, and a ruling on that question is decisive of this case.

We believe that the question presented in this case as to the power of the cashier of a national bank to sell property, other than negotiable instruments, *belonging* to the bank is a federal question, for two reasons. In the first place, it is a federal question, independent of the express provisions of the National Bank Act, because that statute is the source and measure of the power of the bank and of its officers and agents. In the second place, it is a federal question, because of the express provision of that statute as to the powers of the cashier and of the board of directors.

We shall present the matter first on the basis of the National Bank Act being the source and measure of the cashier's powers and duties.

It is recognized by the decisions of this court and of the inferior federal courts that the United States statutes relative to national banks are the source and measure of the authority of a national bank.

Thus in *Cooper* v. *Hill,* 94 Fed. 582, 586, Mr. Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> "The statutes of the United States are the measure of the powers of national banks."

In *California National Bank* v. *Kennedy,* 167 U. S. 366; 42 L. Ed. 198, in considering the federal

question there presented Mr. Justice White, delivering the opinion of the court, said:

> "It is settled that the United States statutes relative to national banks *constitute the measure of authority* of such corporation, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established, *Logan County Nat. Bank* v. *Townsend,* 139 U. S. 67, 73."

Logan County Nat. Bank v. *Townsend,* 139 U. S. 67; 35 L. Ed. 107, *supra,* stands for the proposition that where a national bank, in a suit against it in a state court, set up and claimed the exemption or immunity that it had no power under the National Bank Act to make the contract under which it was sued, the judgment of the state court against the bank and denying such exemption or immunity, gives the Supreme Court of the United States jurisdiction on a writ of error. On page 73, Mr. Justice Harlan, delivering the opinion of the court, said:

> "It is undoubtedly true, as contended by the defendant, that the National Bank Act is *an enabling act for all associations organized under it, and that a national bank cannot rightfully exercise any powers* except those expressly granted by the act, or such incidental powers as are necessary to carry on the business of banking for which it is established." (The italics are ours).

In *Clement National Bank* v. *Vermont,* 231 U. S. 120, 140; 58 L. Ed. 147, 157, Mr. Justice Hughes, delivering the opinion of the court, said:

> "The Federal statutes relative to national

> banks *constitute the measure of authority* of such corporation."

For the same reason that the federal statutes relative to national banks are the source and measure of the powers of a *national bank,* those same statutes are the source and measure of the authority of the board of directors and of the *cashier* and other officers of a national bank. The officers of the bank can rise no higher than the bank itself, and must necessarily look to the same source for *their* powers to which the bank must look for its powers.

And, for the same reason that any question involving the powers of a national bank is a federal question, any question involving the powers of an officer of the national bank is a federal question.

The fact that a question as to the duties of a cashier of a national bank is a federal question is pointed out in the case of *Walker* v. *Windsor National Bank,* 56 Fed. 76, 80. That was an action by a national bank against its cashier on his official bond. The language of Mr. Judge Putnam on page 80 of the report points out clearly why questions dealing with the inherent powers and duties of officers of national banks are federal questions:

> "The bond in the case at bar was conditioned, not only for the faithful execution of the office of cashier by the principal in it, but also that he would perform the duties thereof 'according to law, and the by-laws' of the bank. Even without the express use of the words quoted the condition of a bond of a cashier of a national banking association, providing in terms only for the faithful performance of the duties of his office, or of any bond given as contem-

plated by section 5136, Rev. St., would inevitably imply the further condition that the cashier should regard all the provisions of law looking to the protection of the association from loss, or to the accomplishing of its successful, safe, and profitable operation. Such provisions are found mainly in the Revised Statutes, or are at least so extensively embodied in them, and originated by them, that any attempt to read correctly a bond of the class in suit must lead at once, and directly, to their examination, and must find very largely, if not in the main, its support in their injunctions. If such bonds are not matters of jurisdiction with the federal tribunals, they and the duties of cashiers of national banking associations may be construed and defined very differently, and with absolute lack of harmony, in various states, with no opportunity of securing uniformity by appeal to any courts of the United States; and we think that congress could not have contemplated such a result. We conclude, therefore, that this suit involved a federal question, even in view of the strict construction found in *Cooke* v. *Avery*, 147 U. S. 375, 13 Sup. Ct. Rep. 340, assuming, as no doubt we justly should, that nothing therein is intended to overrule *Tennessee* v. *Davis*, 100 U. S. 257, 264, or any of its expressions. We think our conclusion is aided by the lines of reasoning found in *Bock* v. *Perkins*, 139 U. S. 628, 11 Sup. Ct. Rep. 677; *Pacific R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1113; *Railroad Co.* v. *Amato*, 144 U. S. 465, 12 Sup. Ct. Rep. 740; and *Railroad Co.* v. *Cox*, 145 U. S. 593, 603, 12 Sup. Ct. Rep. 905."

We respectfully submit, therefore, that the question as to the power of an officer or of the board of directors of a national bank is essentially a federal question, irrespective of the particular provisions of the National Bank Act, because that act is the

source and the measure of the power of the bank and of its officers and of its board of directors.

And when a national bank especially sets up the lack of inherent power of its cashier as a defense to the action against it, and the state court decides against the bank on that question, the decision is against a federal right and immunity. And the decision of that question of power, whether it be considered on the basis of the accepted rules applicable to all banks, or on the basis of the interpretation of the exact terms of the National Bank Act, is a decision of a federal question of which this court has jurisdiction on a writ of error to the state court. And the decision of that question necessarily opens up for the determination of this court the entire subject of the power of national bank cashiers, as those powers are defined (whether with reference to national banks or to all banks) in the decisions and by the text writers.

Looking at this question from the point of view evidenced in the opinions by this and other courts and by the text-writers, we believe that it is plain that the defense set up by the plaintiffs in error was a complete and conclusive defense, and that a correct decision of the issue as to the inherent power of national bank cashiers (viewed in the light of the limitations on the powers of *all* bank cashiers) necessitates a reversal of the judgment of the Supreme Court of the State of California.

We have already pointed out that in such cases as *California National Bank* v. *Kennedy*, 167 U. S. 362, 42 L. Ed. 198, this court, having first pointed

out that the National Bank Act was the source and the measure of the power of the national bank, proceeded to decide the federal question as to that power by a consideration of the law as applicable to all corporations without authority to purchase stock in another corporation. The federal question was decided by a consideration of common law principles. And a decision of the federal question here involved by an application of common law principles, necessitates a judgment in favor of the plaintiffs in error.

And the absence of power in the cashier to make the attempted sale is even more readily and conclusively apparent if we look at the express terms of the National Bank Act, for the purpose of ascertaining in whom is vested the power of sale of such property as that here in question.

Primarily the statute places all the powers of national banks in the board of directors.

This appears from section 27 (Rev. Stat. Sec. 5145), which reads in part as follows:

> *"The affairs of each association shall be managed by not less than five directors."* . . .

This further appears in the seventh paragraph of section 15 (Rev. Stat. Sec. 5136), dealing with the incidental powers, the exercise of one of which being involved in this case. This section provides that each association "shall have power: . . . .

> "Seventh. To exercise by its *board of directors or duly authorized* officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking." . . .

It is apparent from this provision of the statute, that it places the bank's incidental powers primarily in the board of directors. The bank is given power "to exercise" its incidental powers in one of two ways, *first,* "by its board of directors," or second, by its "*duly authorized* officers or agents."

It is equally apparent that the statute, by this section (Rev. Stat. Sec. 5136), places all of the incidental powers of the bank in the board of directors, subject only to its officers or agents being "*duly authorized*" to exercise a part of those incidental powers.

The situation then, primarily, is one where by section 27 the statute (Rev. Stat. Sec. 5145) the entire management of "the affairs of each association" is placed in the board of directors, and where by paragraph seven of section 16 (Rev. Stat. Sec. 5136), the bank is given the power to exercise incidental powers "by its board of directors."

It is also given the power to exercise those powers "by its . . . . *duly authorized* officers or agents, subject to law."

The defendants in error, relying as they do upon the claim that the sale of the stock belonging to the bank (the exercise of an incidental power) could be accomplished without any action by the board of directors, must find that the officer or agent who purported to exercise that incidental power was "duly authorized" within the meaning of the seventh paragraph of section 16 of the National Bank Act (Rev. Stat. Sec. 5136). For, if he was not "duly

authorized," then the power remained exclusively where the statute placed it, namely, in the board of directors.

When we come to consider the question as to whether the cashier was "duly authorized" by the statute itself to make this sale, it is answered without difficulty. The statute does not confer such, or any, authority upon the cashier. It places all of the bank's power in the board of directors, where it remains vested until some officer or agent of the bank is "duly authorized" to exercise the particular power.

While the statute does not vest any power in the cashier, it expressly prescribes how some at least of those powers originally vested in the board of directors may be conferred upon officers of the bank, —that is, how they can become "duly authorized." It prescribes that such authority may be given by the by-laws, prescribed "by its board of directors."

The sixth paragraph of section 16 (Rev. Stats. Sec. 5136) provides that the association "shall have power—

> "Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, *regulating the manner in which* its stock shall be transferred, its directors elected or appointed, *its property transferred,* its general business conducted, and the privileges granted to it by law be exercised and enjoyed."

For the purpose of determining whether the directors of the Union National Bank of Oakland, by its by-laws, authorized the sale by the cashier of the

stock in question, it is necessary to read the only provision of the by-laws put in evidence, and the only provision of the by-laws upon which reliance can be placed for the purpose of establishing that the power to sell the stock in question, which power was primarily vested in the board of directors, had been vested in the cashier by the means provided by the National Bank Act.

The by-law upon the subject is found in the transcript at folio 103, and is as follows:

> "The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy and sell bills of exchange, and issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors, of the affairs of the bank, and shall be generally authorized to do whatever may be necessary in the management of the business of the bank. He shall at any meeting of the directors or stockholders, make a full report embracing a general review of the transactions and business of the bank from the date of the last previous report, to the time of such meeting, and upon application furnish information pertaining to the business."

A comparison of the classes of business and functions of a national bank as detailed in the Sixth and Seventh paragraphs of section 16 (Rev. Stat. Sec. 5136) with the above by-law, will disclose that that by-law delegates to the cashier only a part of the powers of the board, and does not vest in the cashier the authority to sell property, other than negotiable instruments, belonging to the bank.

The first function or power mentioned in the Sixth

paragraph relates to the transfer of stock. The by-law does not vest that power or function in the cashier.

The next power or function has to do with the election or appointment of directors. This by-law does not reach that at all.

The next power or function mentioned relates expressly to the transfer of the bank's property. The language is: "To prescribe . . . . by-laws regulating the manner in which . . . . property transferred." There is nothing in that language that in itself would prevent the board adopting by-laws by which they might provide that *all* property belonging to the bank could be transferred by the cashier. Any such a by-law (if valid) would have vested in the cashier powers entirely inconsistent with his office and unknown to bank cashiers generally. It would have left the board with little to do except elect officers and declare dividends.

And the board of directors did not so provide. They provided in the by-law that the cashier "shall have power . . . . to buy *and sell bills of exchange* and issue certificates of deposit" (Tr. fol. 103). *The express grant of power to sell bills of exchange excludes by implication any power to sell stock in another corporation.*

There is general language used in the by-law, which defendants in error claim is broad enough to authorize the sale of this property (Brief for Defendants in Error, page 23). But the adoption of such a suggestion would not only confer upon

the cashier unheard of powers and leave the directors with no substantial functions, but would violate well recognized rules of construction. The general language referred to says that the cashier "shall be generally authorized to do whatever is necessary in the management of the business of the bank."

As a provision of a by-law adopted pursuant to the authority conferred by the Sixth paragraph of section 16 of the National Bank Act (Rev. Stat. Sec. 5133), it should be construed in reference to the language of that paragraph. That paragraph deals with *transferring of property* as one subject, and then it deals with the conduct of the bank's "general business." When the by-law provided that the cashier should be "generally authorized to do whatever is necessary in the management of the business of the bank," it is referable to the provision of the bank act in regard to making provisions for the conduct of its "general business," and not to the separate group or subject already dealt with in the by-law, where the power of sale was limited to negotiable instruments.

We respectfully submit that the National Bank Act vests in the *board of directors* the power to sell property *belonging* to the bank; that the statute vests *no power of sale* in the cashier, leaving that matter to be provided for in the by-laws adopted by the board of directors; and that the board of directors of the Union National Bank did not, by any by-law or otherwise, vest in the cashier the power to make any sale to the defendants in error of the stock of the Burnham-Standeford Company, of which

the bank had been the *owner* for three years, and which had been for that period of time carried by the bank on its books in the bond and investment account.

On the contrary the only power of sale vested in the cashier, by the by-laws adopted by the board of directors, was the power to sell negotiable instruments, or (to use the language of the by-laws) to *"sell bills of exchange"* (Tr. fol. 103). No citation of authority is necessary for the purpose of establishing that this is a proper place for the application of the fundamental rule or maxim of construction: *"Expressio unius est exclusio alterius."*

And an application of that rule leads to the conclusion in harmony with the general law applicable to bank cashiers, namely, that the cashier of the Union National Bank was not authorized by the by-laws to sell property *belonging* to the bank, other than negotiable instruments.

There is no real conflict in the authorities as to the power of cashiers of state and national banks, and there can be no serious doubt that, under the National Bank Act and the by-laws of this bank, the cashier had no power to make the sale in question.

Viewing the matter either in the light of the expression of courts and text writers, or in the light of the express provisions of the National Bank Act and the failure of the by-laws to take the power of sale (except as to negotiable instruments) from the exclusive control of the directors and vest it in the cashier, there can be no serious question that the

attempted sale to McBoyle was of no effect. Nor can there be any serious doubt that the right and immunity set up by plaintiffs in error under the statute of the United States entitled them to a judgment in their favor, and now entitle them to a reversal of the judgment of the state court.

A federal question is presented and its correct decision is decisive of this case.

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3. THE CASES DEALING WITH WHAT IS A FEDERAL QUESTION CITED IN THE BRIEF OF DEFENDANTS IN ERROR, ARE NOT IN POINT.

Leather Mfg. Bank v. *Cooper,* 120 U. S. 778; 30 L. Ed. 816, cited on page 12, came to the Supreme Court on a writ of error to the Circuit Court of the United States for the Southern District of New York, and involved the right of removal to the federal court for trial, and did not involve any writ of error to a state court under Sec. 709 of the Revised Statutes. The case simply stands for the proposition that national banks cannot remove cases simply because they are foreign corporations.

Petri v. *Commercial Bank,* 142 U. S. 644, 35 L. Ed. 1144, cited on page 12, was the same kind of case, and involved no question under Sec. 709 of the Revised Statutes. It involved the right of removal based on the citizenship of the national bank.

Ex Parte Jones, 164 U. S. 691, 41 L. Ed. 601, cited on page 12, was a petition for a writ of man-

damus, and involved the question as to a citizenship of a national bank.

American Nat. Bk. v. *Tappan,* 174 Fed. 431, 433, cited on page 21, did not arise under Sec. 709 of the Revised Statutes. But the quotation from Judge Lowell to the effect that to have a federal question there "must be shown a controversy concerning the *meaning or application of the statute,*" would suggest that there is a federal question here involved.

Conde v. *York,* 168 U. S. 642; 42 L. Ed. 611, cited on page 13, was a case of a writ of error to a state court. The plaintiff in error claimed no right, title, or immunity under any statute of the United States; and the writ was dismissed. The case does not seem to have any application.

Crary v. *Devlin,* 23 L. Ed. 510, cited on page 13, simply lays down the rule, as stated in the syllabus;

> "Where the decision of the State Court did not deny the validity of any statute of the United States, but denied the existence of facts necessary to bring the case within its operation, this court has no jurisdiction."

In *Millingar* v. *Hartupee,* 6 Wall. 258, 18 L. Ed. 829, cited on page 13, the plaintiff in error sought to establish a federal question as arising out of an order of a district court in reference to the custody of certain cotton. The writ was dismissed upon the ground that the order did "not purport to confer any authority upon him." As illustrating the ground of dismissal, the court says:

> "If the right were claimed under a treaty or statute, and on looking into the record, it should

> appear that no such treaty or statute existed, or was in force, it could hardly be insisted that this court could review the decision of the state court, that the right claimed did not exist."

Leyson v. *Davis,* 170 U. S. 36; 42 L. Ed. 939, cited on page 14, as appears from the portion of the opinion quoted by defendants in error, simply involved the question as to which of two claimants had the superior equitable title to the national bank stock in controversy. The court did not decide that no federal question would be involved if the rights of the bank under the statute was in issue. In fact the court expressly points out that the rights *"of the* bank, were not in issue or determined, but simply the equities as between the particular parties."

The nature of the controversy in *Le Sassier* v. *Kennedy,* 123 U. S. 521, 31 L. Ed. 262, cited on page 15-17, is stated in the brief of defendants in error. The state court there held that defendants "obligation, if any there is, grows out of his contract . . . , and not out of the banking law." But, in the present case, the plaintiffs in error claim that under the banking law no contract or sale of the stock in question was or could be made except by the board of directors. The case does not appear to be in point.

Capital National Bank v. *First National Bank of Cadiz,* 172 U. S. 425, 43 L. Ed. 502, cited on page 17, is shown clearly not to be an authority in favor of defendants in error, not only by an examination of the entire report of the case, but also by that portion of the opinion quoted in the brief of de-

fendants in error. In the first place the court explicitly points out (page 431) that,

> "The record discloses no Federal question asserted in terms save in the application to the supreme court for a rehearing, *when the suggestion came too late.*"

But in the present case the Federal question was asserted in terms in the trial court, and in the supreme court of the state, before the final decision was rendered.

That case simply stands for two propositions, first, that the suggestion of the federal question on petition for rehearing comes too late; and second, that a claim that a judgment against a receiver is "contrary to law" does not raise a federal question. But in so far as the court treats the case as one where a federal question *was* set up on petition for rehearing, it is an authority in favor of the plaintiffs in error. This is true because, as appears from the statement by Mr. Chief Justice Fuller (page 430), the federal question was there asserted in much the same way as it was asserted in the present case (save in point of time), namely, that the decree was "in violation of the provisions of the 'national bank act' of the United States under whose authority this appellant was appointed and acting."

Chemical National Bank v. *City Bank of Portage,* 160 U. S. 646, 40 L. Ed. 568, cited on page 18, announces no principle of law adverse to the assertion of a federal question in the present case. The statement by Mr. Chief Justice Fuller (page 651) shows that the state court held that the "plaintiff

was entitled to recover under the common counts," that the bank received and kept the money, and that "the purchase of the stock and the borrowing of the money from plaintiff were two distinct transactions." And, in the opinion, the Chief Justice further points out that the federal question as to the power of the bank to purchase its own stock was not decided, and that this court is bound by the finding of facts in the state court. The portions of the opinion to which we refer are as follows (page 653, 654):

> "The decision of the supreme court rested on the fact that the purchase of the stock and the loaning of the money from the City bank at Portage were two distinct transactions, and this was a ground broad enough to sustain the judgment without deciding any Federal questions at all. . . . As the supreme court proceeded to judgment upon the facts as thus determined, we must accept its view as controlling."

We submit that the cases cited by defendants in error on the subject, as to when a federal question arises, are not in point.

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4. UNDER THE LOCAL RULE OF PRACTICE, THE CLAIMS OF RATIFICATION, ESTOPPEL, AND LIKE MATTERS CANNOT BE CONSIDERED BECAUSE OF THE ABSENCE OF FINDINGS THEREON.

We have already seen that the state Supreme Court considered and decided but one question, namely, did the cashier have authority by virtue of

his office to sell the corporate stock belonging to the bank and carried by it on its books as an investment?

But in the brief for defendants in error, an effort is made to support the judgment on different theories than those considered in the state court. Thus they argue (page 55-64) that the board of directors impliedly ratified the attempted sale by reason of the lapse of sixteen days between January 3rd, 1907, the date of the attempted sale, and January 19th, 1907, the date of the passage of the resolution repudiating the attempted sale. Then they argue (page 64-72) that the bank was estopped from denying McBoyle's title because he paid only $1,500 cash and left the stock as a pledge to secure the payment of the balance of $9,500 he agreed to pay for the stock. And again they argue (page 28-30) that the cashier had extraordinary power on January 2nd and 3rd, 1907, because of the purchase and sale about that time of a majority of stock in the bank, and because no board meeting was held after the attempted sale on January 3rd, 1907, until the following day.

We shall presently point out that these claims are each and all lacking in substantial merit.

But, even if they were meritorious, they are unavailing, because, under the rule of practice as established in California, they could not be considered by the state Supreme Court, and consequently cannot be considered by this court.

We have already seen that the state Supreme

Court did not pass upon, or even mention, these claims upon which defendants in error place so much reliance. One reason why they were not mentioned was that they were not substantiated by the evidence. Another reason, and a controlling one here, is that *the trial court made no findings as to these claims.* And it is a rule of practice in California, that, in the absence of findings on the issue by the trial court, the appellate court will not sustain a judgment on the theory of ratification, or estoppel, or similar defenses.

On page 55 of their brief, defendants in error, apparently realizing the weakness of their case because of the absence of both pleadings and findings covering the matters under consideration, refer to section 462 of the California Code of Civil Procedure for the rule that new matter in an answer is deemed denied without any replication. That doctrine of "implied replication" is applicable only to *pleadings,* and not to *findings.*

On the same page, defendants in error cite *Goetz* v. *Goldbaum* 37 Pac. 646, decided by the California Supreme Court in 1894. But that case simply holds that a *finding of ratification* is proper (when supported by the evidence), although ratification was not expressly pleaded. The case can have no application here, because here there was no finding of ratification or estoppel.

The rule applicable here is presented by the decision in the *Estate of Yoel* 164 Cal. 540, 129 Pac. 999 decided by the California Supreme Court in 1913. On page 547, the court says:

"And, from another point of view, no different result is reached if it be said that the petitioner was not obliged to anticipate a reliance by the administratrix upon the terms of the separation agreement, and that therefore when, in the answer and opposition of the administratrix the agreement was set forth, the petitioner was allowed the implied replication of section 462 of the Code of Civil Procedure. Assuming that under such an implied replication, evidence of fraud might be given. (*Moore* v. *Copp,* 119 Cal. 433, (51 Pac. 630), it necessarily follows that by the same implication of law there is given to the defendant (in this case the administratrix in opposition) an implied rejoinder, under which she may prove estoppel, a failure to rescind, laches, the statute of limitations or any other matter of defense. But assuming that all these new issues may thus be injected into the case without pleading, nevertheless it follows that before a judgment can be entered under such circumstances and *before these matters can be reviewed upon appeal, the court must have made specific findings one way or the other thereon. This the court did not do and so, as has been said, from this point of view, the matters are not open to consideration on this appeal."* (The italics are ours).

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5. THE CLAIMS OF DEFENDANTS IN ERROR THAT ANY EXTRAORDINARY POWERS WERE CONFERRED ON THE CASHIER, AND THAT THE DIRECTORS RATIFIED THE ATTEMPTED SALE AND THAT THE BANK WAS ESTOPPED BY THE PURPORTED PLEDGE, ARE EACH AND ALL WITHOUT MERIT.

But, if the defendants in error were not barred by

the absence of findings from prosecuting these claims in the state Supreme Court, and consequently from presenting them here, those claims would still be unavailing, because they are each and all lacking in substantial merit.

The claim that some extraordinary power was vested in the cashier for the two days namely, January 2nd, and January 3rd, 1907, is based on the authorities which recognize that exceptional powers may be conferred on a cashier or other agent by long usage or by the surrender to the cashier or other agent of the entire management of the business of the principal.

There is absolutely nothing in the record to justify the application of such authorities to the attempted sale to McBoyle.

The sale was first discussed between McBoyle and the cashier on January 2nd, 1907 (Tr. fol. 53) and the purported sale was closed on the following day (Tr. fol. 57).

The "inference" that the cashier was "the *only* officer of the bank through whom the business of the bank could be conducted" (page 28) which defendants in error ask to have drawn, is based solely upon the following facts:

About January 1st, 1907, J. Dalzell Brown completed negotiations for the purchase of the stock of Prather, the president, and of some other stockholders; The stock was transferred to him on the 2nd, or 3rd, or 4th of January (Tr. fols. 119, 120). Prather had charge at least as late as the 2nd (Tr.

fol. 116), and the board was reorganized at a meeting held on the 4th (Tr. fol. 90, 91). On January 2nd (Tr. fol. 119), the cashier consulted with Brown about the proposed sale to McBoyle; but on that day Brown was not even a stockholder (Tr. fols. 119, 120). The attempted sale to McBoyle was closed on the 3rd (Tr. fol. 57).

There are no other facts shown in the record, and no suggestions even of any other facts, upon which defendants in error ask this court to base an "inference" that the cashier was vested with extraordinary powers between New Year's Day (a holiday) and January 4th, when the board of directors was re-organized. There is not even any suggestion of any necessity for the sale in those two days of the Burnham-Standeford Stock, which the bank had held as a pledge for seven years (Tr. fol. 84) and as an investment for three years (Tr. fol. 85).

We respectfully submit that the suggestion that any extraordinary power was vested in the cashier on January 2nd or 3rd, 1907, is wholly lacking in any support in the record, or in law.

The claim that the attempted sale was ratified by the board is equally without merit. No express ratification is claimed, and the record shows no facts from which a ratification will be implied.

The attempted sale was closed on January 3rd, 1907, and the resolution repudiating the sale was passed on January 19th. This period of time was but sixteen days, although, if it were "almost three weeks" as suggested by defendants in error (page 56), it would still be of slight significance.

Defendants in error state that during that period "two directors' meetings, and one stockholders' meeting were held" (page 56). The statement is literally true, though unintentionally misleading. The meetings were, first, a meeting of the board on January 4th, at which no business was transacted except to reorganize the board (Tr. fols. 90, 91); second, a *stockholders* meeting on the 8th, which conducted no business whatever owing to the funeral of a late director (Tr. fols. 91, 92); and, third, a special meeting of the board on the 11th, at which a dividend was declared, two directors elected, and a notice given of intention to amend the by-laws (Tr. fols. 92, 93). At none of these meetings was any banking business transacted, and of course the stockholders would have no power to deal with the attempted sale to McBoyle.

There is no showing that any of the directors, except Palmer and Brown, had actual knowledge of the sale until the meeting of January 19th, when the resolution repudiating the sale was passed. On page 57, defendants in error refer to the actual knowledge of Crane, the assistant cashier, and of de Fremery a director. But they simply *infer* that knowledge from the fact that the record shows that McBoyle saw them in the bank on the 3rd. There is no evidence of their knowledge of the sale, or that Crane was a director. It is probably true that the director had constructive knowledge from the entries in the bank's books; but, on neither reason nor

authority, does constructive knowledge demand action as promptly as does actual knowledge.

We know of no case that has held that a delay of sixteen days in acting on *constructive* knowledge, with nothing more, can constitute a ratification. Nor has there been called to our attention any case where it has been held that a delay of sixteen days even after actual knowledge is *in itself*, sufficient to constitute a ratification of an unauthorized act.

The suggestion on page 58 of the brief of defendants in error, that, "During this period of almost three weeks they (the directors) chose to remain quiescent and to await the rise and fall in value of the stock," is the product of an unfettered imagination. It has no support in the record, and there is no claim that the record contains any support for the statement. The statement is shown to be particularly inapt, when it is recalled that McBoyle, the president of the Burnham-Standeford Company, said that the stock had no market value, and that even he did not know its value; that its value was a matter of mere conjecture; "No one can tell as to the value of the stock" (Tr. fol. 78). The picture painted in the brief of defendants in error of the bank directors, four or five out of seven (Tr. fol. 90) of whom had only a *constructive* knowledge of the purported sale, remaining "quiescent . . . to await the rise and fall in value of the stock," cannot be taken seriously, especially in view of the testimony of McBoyle himself.

The delay of sixteen days, after the attempted sale, which delay defendants in error insist in refer-

ring to as a delay "of almost three weeks," during which actual knowledge could only be shown in two our of seven directors, is in itself absolutely colorless. If there were any damage thereby suffered by defendants in error, there might be some evidence of ratification.

But no damage is shown, or even suggested. The time that a principal may take in repudiating the unauthorized act of its agent is "dependant upon the circumstances of the particular case" (31 *Cyc* 1275, 1276), and no delay will amount to implied ratification *unless some injury results* from the delay to the party interested (31 *Cyc* 1277, 1278), or "unless the case contains an element of implied estoppel" (31 *Cyc.* 1278).

The view of this claim as entertained by the state court is evidenced by the total absence from both the opinions of any reference to any possible ratification. That ratification was not one of the grounds or reasons for the decision is further evidenced by the provision of the California Constitution (Art. VI, Sec. 2) that all decisions of the Supreme Court "shall be given in writing, *and the grounds of the decision shall be stated.*" There is no chance then for any inference that the state court placed any faith whatever in the suggestion of ratification by the delay of "almost three weeks."

The attitude of the California Supreme Court upon the subject of ratification by delay alone, is shown by its decision in *Hannah* v. *Steinman,* 159 Cal. 142, 112 Pac. 1094 decided a little over a year

before the first decision in the present case. In that case there had been a delay of *about eight months,* but the court held that it was not a bar to the party's right to rescind. On page 154, the court says:

> "If there were a vestige of evidence to indicate that plaintiff delayed proceedings in this matter because of any uncertainty in his own mind as to whether or not it might be profitable to him to retain this lease, a very different case would be presented. It is proper also to say that there is no evidence whatever to indicate that defendant may have been injured by the delay."

We respectfully submit that there is no evidence of ratification, and that neither the trial court nor the appellate court of the state found or considered any ratification, and that on no theory can any element of ratification enter into a consideration of this case. The board of directors acted within sixteen days after their first constructive knowledge, and on the day a majority of them received actual knowledge. It tendered to McBoyle his $1,500 and legal interest. If he suffered by the delay, he failed to make any suggestion of his suffering in his testimony.

Nor is there any merit in the suggestion that the case presents any element of estoppel. The suggestion of estoppel is based on the fact that McBoyle paid but $1,500 on account of the price of $11,000 he agreed with the cashier to pay for the stock, leaving the stock with the bank as a pledge to secure the payment of his note for $9,500 given for the balance of the purchase price. The evidence showed that

one Schammel, a note teller handed the certificate to McBoyle, who looked at it while Schammel was filling in the form of collateral note used by the bank. The court found that "as a part of the same transaction" (Tr. fols. 54,55) McBoyle handed the certificate back to Schammel, and signed the note, and left the note and certificate with Schammel.

It is plain, we believe, that McBoyle never had any more than a qualified possession of the certificate. He was not free to take the certificate away from the bank; therefore the handing of the certificate back to Schammel was not such a "voluntary surrender" to a bailor as would furnish any basis of estoppel.

But, aside from the fact that there was no voluntary surrender to Schammel, there is another circumstance that shows that the bank was not estopped because of the transaction with Schammel.

As long as the cashier had no authority to make any sale to McBoyle, the certificate of stock, even if it had been in McBoyle's exclusive possession, certainly was not his property; it remained the property of the bank. The bank's employee, Schammel, had no authority to accept from McBoyle property belonging to the bank, and agree to hold that property as a pledge from McBoyle. In other words, the bank's employee had no authority to accept a pledge of the bank's property to the bank. The bank, therefore, was not bound by Schammel's act, and could not be estopped thereby. The doctrine of estoppel as between pledgee and

pledgor does not apply because the act of Schammel in accepting the pledge was unauthorized and was not the act of the bank. The bank never recognized McBoyle as pledgor, and therefore cannot be estopped from denying his title to the stock and asserting title in itself.

Although the act of Schammel in agreeing to hold the stock as a pledge from McBoyle was unauthorized, still that act might have been ratified by the bank. But the bank did not ratify Schammel's act. There is no pretense that there was any express ratification; and there is no implied ratification, unless the retention of the stock (the retention of the benefits of the agent's unauthorized act) amounted to ratification.

But the bank only retained its own property; it retained nothing that it would not have been entitled to regardless of Schammel's authorized act. The retention, therefore, cannot amount to a ratification.

In 31 *Cyc.* 1268-1269, in dealing with the doctrine that the acceptance of the fruits of an unauthorized contract amounts to an implied ratification, one of the exceptions to the doctrine is thus stated:

> "Nor does it apply if he (the principal) is legally entitled to what he has received without assenting to the act of the agent."

So in *Mechem on Agency,* Section 149, page 96, the exception is stated:

> "Nor will the receipt of money ratify the sale when the principal would have the right

to receive the money without ratifying the sale."

And in Volume 1 of *Clark & Styles "Law of Agency"* at page 328, the law is stated thus:

> "Nor would the retaining of personal property by the principal be a ratification of the agent's unauthorized act in obtaining the property, where the principal, without the agent's acts, was entitled thereto."

In the case of *Baldwin Fertilizer Co.* v. *Thompson,* 106 Ga. 480, 32 S. E. 591, the second paragraph of the syllabus (by the Court) is as follows:

> "A principal, who, in law, is entitled to the possession and control of personal property, is not bound by an unauthorized agreement of an agent, by which the principal obtains the possession thereof; nor will the principal, merely by retaining possession of such property after receiving the same from the agent, be charged with a ratification of the act of the agent. This is so because it was the right of the principal, either with or without such an agreement, to hold and possess the property."

It follows, therefore, that there never was any valid pledge of the stock certificate to the bank, because Schammel had no authority to agree to hold the certificate as a pledge, and his unauthorized act was not ratified by the bank's retention of the certificate that it was entitled to retain without ratifying its agent's unauthorized agreement to hold the certificate as a pledge from McBoyle.

There is therefore no issue involved in this case, except the federal question presented to, and decided by, the state Supreme Court.

We respectfully submit that the plaintiffs in error were entitled to judgment, and that the judgment of the state court against them should be reversed.

Respectfully submitted,

R. M. FITZGERALD,
CARL H. ABBOTT,
CHARLES A. BEARDSLEY,
Attorneys for Plaintiffs in Error.

SUBJECT INDEX.

Page

STATEMENT OF FACTS 4

ARGUMENT.

I. THE CASE IS NOT WITHIN THE JURISDICTION OF THIS COURT, AND THE WRIT OF ERROR SHOULD, THEREFORE, BE DISMISSED 9

(1) No title, right, privilege or immunity under the National Bank Act or authority exercised under the United States, is here involved 9

(2) Plaintiffs in error failed to specially set up and claim their alleged title, right, privilege, immunity or authority prior to the decision of the Supreme Court of California upon the first appeal 20

II. THE BANK WAS BOUND BY THE SALE MADE BY PALMER 21

(1) Under the particular circumstances under which the sale in question was made, it was within the powers of the cashier 22

(a) The re-sale of the stock was an act "necessary in the management of the business of the bank", within the meaning of the by-laws, since it was made for the purpose of enabling the bank to realize upon the Burnham loss 23

(b) The directors had left to Palmer the entire control of the affairs of the bank, and at the time of the sale he was the only officer through whom the business of the bank could be transacted 28

(2) Apart from the special circumstances which have been referred to, the sale was within the general powers possessed by cashiers of either state or national banks 30

(3) Conceding, solely for the purpose of the argument, that Palmer exceeded his authority in making the sale, the evidence establishes an implied ratification thereof 54

III. THE STOCK HAVING BEEN PLEDGED BY MCBOYLE WITH THE BANK, THE BANK IS ESTOPPED TO DENY HIS TITLE THERETO 64

LIST OF AUTHORITIES CITED IN BRIEF.

Pages

American Natl. Bank v. Tappan, 174 Fed. 431, 433..... 12
Atlantic Ry. Co. v. Spires, (Ga.) 57 S. E. 973..... 70
21 Am. & Eng. Ency. Law 862..... 33
Arnold v. National, 105 N. W. 828, 3 L. R. A. (N. S.) 580 43

Bartlett Estate Co. v. Wyneken, 11 Cal. App. 373 105 Pac. 130..... 33
Bank of Vergennes v. Warren, (N. Y.) 7 Hill 91..... 37
Bass v. Chicago etc. Co., 42 Wis. 654; 24 Am. Rep. 437... 56
Brown v. Crown etc. Co., 150 Cal. 376; 89 Pac. 86..... 57
Bates v. Capital State Bank, (Id.) 110 Pac. 277..... 70
Barker v. Lewis Storage Co., (Conn.) 65 Atl. 143..... 70
Bigelow on Estoppel, p. 548..... 71

California Bank v. Kennedy, 167 U. S. 366; 42 L. Ed. 198; 17 Sup. Ct. 831..... 24
Concord etc. Bank v. Hawkins, 174 U. S. 366; 43 L. Ed. 1007; 19 Sup. Ct. 739..... 24
2 Cook on Corporations, Sec. 718..... 31
Carpy v. Dowdell, 115 Cal. 677; 47 Pac. 695..... 35
Carr v. National Bank etc. Co., 167 N. Y. 375; 82 Am. St. Rep. 725..... 39
Curtin v. Salmon River Co., 141 Cal. 308; 74 Pac. 851.... 57
Citizens Bank etc. Co. v. Thornton, 174 Fed. 752, 760.. 44
Citizens Bank v. Bank of Waddy's Receiver, (Ky.) 103 S. W. 249; 11 L. R. A. 598..... 44
Conde v. York, 168 U. S. 642; 42 L. Ed. 611; 18 Sup. Ct. 234..... 13
Crary v. Devlin, 92 U. S. 327; 23 L. Ed. 510..... 13
Capital Bank v. Cadiz Bank, 172 U. S. 425; 43 L. Ed. 502; 19 Sup. Ct. 202, 204..... 17
Chemical Natl. Bank v. City Bank of Portage, 160 U. S. 646; 40 L. Ed. 568; 16 Sup. Ct. 417..... 18
Capital etc. Bank v. First Natl. Bank, 172 U. S. 425; 43 L. Ed. 502; 19 Sup. Ct. 202..... 21

Dollar v. International Banking Corporation, 13 Cal. App. 331; 109 Pac. 499..... 34
Dickinson v. Zubiate Mining Co., 11 Cal. App. 656; 106 Pac. 123..... 56

Pages

Everett v. U. S., 6 Porter 584; 30 Am. Dec. 584..... 44

First Natl. Bank v, Anderson, (Ind. Ty.) 82 S. W. 693.39, 44
First Natl. Bank v. Conway, 151 Pac. 1129, 1134..... 30
First Natl. Bank v. Converse, 200 U. S. 438; 50 L. Ed. 537; 26 Sup. Ct. 306..... 24
First Natl. Bank v. Greenville etc. Co., (Tex.) 60 S. W. 828 38
First Natl. Bank v. First Natl. Bank, (Ala.) 22 So. 976.. 40
First Natl. Bank v. National Exchange Bank, 92 U. S. 122 25
Foster v. Rockwell, 104 Mass. 167..... 59
Fisher v. Motor Boat Club, 113 N. Y. Supp. 56..... 63
First Natl. Bank v. Mason, 95 Pa. St. 113; 40 Am. Rep. 632 68

Gazoo etc. Co. v. Adams, 180 U. S. 1; 45 L. Ed. 395; 21 Sup. Ct. 240..... 21
Greig v. Riordan, 99 Cal. 316; 33 Pac. 913..... 35
Goetz v. Goldbaum, (Cal.) 37 Pac. 646..... 55

Harrold v. McDaniels, 126 Mass. 413, 415..... 62
Hampton v. Swisher, 4 N. J. L. 66, 74..... 71
Hindman v. First Natl. Bank, 112 Fed. 931; 57 L. Rep. Ann. 108..... 44

Indianapolis Rolling Mill v. R. R. Co., 120 U. S. 256; 30 L. Ed. 639; 7 Sup. Ct. 542..... 61

Johnson Co. v. Chamberlain, (Neb.) 113 N. W. 1055..... 42
Jones, Ex parte, 164 U. S. 691; 41 L. Ed. 601; 17 Sup. Ct. 222 12
Judicial Code, Sec. 237..... 13

Kelsey v. National Bank, 69 Pa. St. 426..... 61

Leather Manufacturers Natl. Bank v. Cooper, 120 U. S. 778; 30 L. Ed. 816; 7 Sup. Ct. 777..... 12
Leyson v. Davis, 170 U. S. 36; 42 L. Ed. 939; 18 Sup. Ct. 500 14
Le Sassier v. Kennedy, 123 U. S. 521; 31 L. Ed. 262; 8 Sup. Ct. 244..... 15

Pages

McBoyle v. Union Natl. Bank, 162 Cal. 277; 122 Pac. 458.. 2, 3
McBoyle v. Union Natl. Bank, 168 Cal. 263; 142 Pac. 837.. 2, 4
Millingar v. Hartupee, 6 Wall. 258; 18 L. Ed. 829..... 13
Merchants Natl. Bank v. Wehrmann, 202 U. S. 301; 50 L. Ed. 1036; 26 Sup. Ct. 613..... 24
Magee on Banks and Banking, Sec. 134..... 31
Morse on Banking, Sec. 158..... 31
Mills v. Boyle Mfg. Co., 132 Cal. 95; 64 Pac. 122..... 57
Natl. Bank v. Friedenberg, (Pa.) 55 Atl. 960..... 44
Osgood v. Nichols, 71 Mass. 420; 5 Gray 420..... 71
Petri v. Commercial Bank, 142 U. S. 644; 35 L. Ed. 1144; 12 Sup. Ct. 325..... 12
Power v. Woolfolk, (Mo.) 111 S. W. 1187..... 44
Pepper v. James, (Ga.) 67 S. E. 218..... 70
Phillips v. Sanger Lumber Co., 130 Cal. 431; 62 Pac. 749.. 57
Pullman v. Burlingame, 81 Mo. 111; 51 Am. Rep. 229.. 68
Preston v. Central California etc. Co., 11 Cal. App. 190, 200; 104 Pac. 462..... 36
Revised Stats., Sec. 5136, U. S.....10, 58
Scott v. Superior etc. Oil Co., 144 Cal. 140; 77 Pac. 817.. 57
Standard Leather Co. v. Allemania Fire Ins. Co., (Pa.) 73 Atl. 192..... 62
Stonard v. Dunkin, 2 Camp. 244..... 66
Simpson v. Wren, 50 Ill. 222; 99 Am. Dec. 511..... 66
Stephens v. Vaughn, 4 J. J. Marshall 206; 20 Am. Dec. 216 70
Simonton on the Law of Checks, Notes & Banks, p. 41.. 30
Story on Agency, Sec. 114..... 33
Security Savings Bank v. Smith, (Ia.) 119 N. W. 726.... 41
Sherwood v. Home Savings Bank, (Ia.) 109 N. W. 9.... 43
Steinke v. Getzer, (Ia.) 79 N. W. 286..... 43
Thompson v. Williams, (Kans.) 1 Pac. 47..... 71
2 Thompson on Corporations, Secs. 1530 and 1531..... 32
The Natl. Bank v. Equitable Trust Co., (Pa.) 72 Atl. 794.. 43
Union etc. Co. v. Kirchoff, 169 U. S. 103; 42 L. Ed. 677; 18 Sup. Ct. 260..... 21
Van Zeil on Bailments & Carriers, p. 17..... 71
West v. Prather Co., 7 Cal. App. 81; 93 Pac. 892..... 56
Ward v. Williams, 26 Ill. 477; 79 Am. Dec. 385..... 61

In the Supreme Court
OF THE
United States

No. 511

UNION NATIONAL BANK and CLAUD GATCH, substituted for H. N. MORRIS, as receiver of said Union National Bank,
Plaintiffs in Error,

vs.

GEORGE MCBOYLE and LULU MAY MCBOYLE,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

This action was brought in the Superior Court of the State of California, in and for the County of Alameda, by George McBoyle and his wife against the Union National Bank, a corporation organized under the National Bank Act and then engaged in business in Oakland, California, to recover 599 shares of the capital stock of the Burnham-Standeford Company, a corporation, upon the claim that the same had been pledged by the said plaintiffs

with said bank to secure a demand note executed by the said George McBoyle to said bank for the sum of $9500 and interest and dated the 3rd day of January, 1907; and that, though tender of the said amount with interest had been duly made, the bank had refused to redeliver the stock (Tr. fols. 2-5). The first trial resulted in a judgment for defendant, which was reversed on appeal by the Supreme Court of California (Tr. fols. 135-139, 162 Cal. 277; 122 Pac. 458). Upon the retrial of the case, judgment went in favor of plaintiffs, and this judgment was on appeal affirmed by the Supreme Court (Tr. fols. 140, 141; 168 Cal. 263; 142 Pac. 837).

That the general nature of the questions involved may be understood, it will be advisable at this point to refer briefly to the issues presented by the original and amended answers of the defendant. The answer originally filed, after denying most of the above facts upon which the plaintiffs' cause of action is based, set up as an affirmative defense that prior to said 3rd day of January, 1907, the bank was the owner of said stock, and that on that day Mr. Charles E. Palmer, the cashier of the bank, had made a purported sale of the stock to McBoyle, which sale was induced by the fraudulent representations of the latter (Tr. fols. 8, 9). It was further alleged in the answer that the said Palmer "in attempting to make said sale to the said George McBoyle acted beyond his power and authority as cashier of the defendant, and without

the consent or authorization of the defendant or its board of directors" (Tr. fol. 10), and that, after the sale, the latter had repudiated the sale and given notice thereof to McBoyle (Tr. fol. 10). These matters were pleaded as a justification for the retention by defendant of the stock—which, immediately after the sale, had been pledged by plaintiffs with it to secure a part of the purchase price.

After the commencement of the action and before the trial, the bank went into the hands of a receiver, who, by stipulation, was made a party to the action, it being agreed that the answer filed by the bank should stand, also, as his answer (Tr. fol. 13). No evidence tending to support any of the charges of fraud was introduced at the trial, and the trial court found against defendants upon that point (Tr. fols. 21, 22). It determined, however, that the said sale made by the said Palmer was "beyond his power and the scope of his authority either express or implied" (Tr. fol. 23), and it accordingly gave judgment in favor of defendants.

The cause was thereupon appealed to the Supreme Court of California, which held that under the facts presented by the record, the sale made by the bank's cashier was binding upon it. The judgment was accordingly reversed (Tr. fols. 135-139; 162 Cal. 277; 122 Pac. 458).

After the remittitur had issued from the Supreme Court and its judgment had become final, defendants filed in the Superior Court their

amended answer, wherein *for the first time* they set up the claim that a federal question was presented, alleging therein "that said cashier had no power or authority to sell said stock under the terms and provisions of the 'National Bank Act' or under any of the Acts of Congress, or under any provision of law or otherwise, or at all" (Tr. fol. 44). Judgment in the Superior Court was thereupon entered in favor of plaintiffs pursuant to the said judgment which had been rendered by the Supreme Court. Defendants then appealed from this judgment to the Supreme Court of California, which affirmed the judgment (Tr. fols. 140, 141; 168 Cal. 263; 142 Pac. 837); whereupon this writ of error was taken out.

Some of the questions which are argued herein make advisable, we think, a fuller statement of the facts than is made in the brief for plaintiffs in error. We shall, therefore, restate the facts as succinctly as possible.

Statement of Facts.

Said stock was originally owned by one Burnham, who pledged it with the bank to secure an indebtedness of $10,500 (Tr. fols. 84-86, 74). Some years before the commencement of the action, Burnham became insolvent and his indebtedness remaining unpaid, the stock was sold and acquired by the bank (Tr. fols. 85, 86).

On January 2, 1907, the stock stood on the books of the bank at the amount of this loan—$10,500 (Tr. fol. 74). On that day Mr. C. E. Palmer, the cashier and secretary of the bank, in the course of a conversation with Mr. McBoyle at the bank with reference to an overdraft of said Burnham-Standeford Co., of which McBoyle was president, remarked that the national bank examiners had stated that said overdraft was excessive and had also severely criticized the bank officials for re-aining said stock (Tr. fols. 73, 74). McBoyle replied that the stock was "all right" (Tr. fol. 74), and that if proper terms could be arranged, his wife would purchase it from the bank (Tr. fols. 74, 75). After some negotiations, McBoyle offered $11,000 for the stock, adding, at the suggestion of Palmer, $500 to the amount at which it stood upon the books of the bank to cover interest. Palmer then said, "Well, that is a fair offer; that is a fair offer; I will take the matter up with Mr. J. Dalzell Brown, and if Mr. Brown says to sell the stock, you can have it" (Tr. fol. 75). Brown, it may be said here in passing, a few days previously had consummated the purchase of a controlling interest in the stock of the bank, and on the next day after the sale to McBoyle was made, he was formally installed as its vice-president (Tr. fol. 106). After greeting some of the other officials of the bank, and being informed by Palmer that he (Palmer) was to be promoted to its presidency, McBoyle left (Tr. fol. 75).

Later in the day Palmer "called up" McBoyle upon the telephone and said, "I want to tell you I have seen Mr. Brown, and he says to sell the stock. Come up in the morning and make the arrangement. The stock is yours" (Tr. fol. 76). The following morning McBoyle again called upon Mr. Palmer at the bank and arranged the terms upon which the purchase price was to be paid, viz: $1500 cash and the balance ($9500) by a demand note to be executed by McBoyle (Tr. fols. 79, 80).

McBoyle then left the bank and shortly after returned with $1500 belonging to his wife, which he paid to Mr. Schammel, the assistant cashier and note teller of the bank, in accordance with Palmer's direction (Tr. fols. 80, 68, 69). Schammel thereupon delivered to McBoyle the certificate, duly endorsed, and went on making out the note (Tr. fol. 69). The latter retained possession of the certificate while this was being done (Tr. fols. 69, 54, 55), which occupied some five or ten minutes (Tr. fol. 71). After executing the note and the contract appended thereto providing that the stock was to be held as collateral to secure the payment of the note, McBoyle handed the certificate back to Schammel to be retained as such collateral (Tr. fol. 66). The transaction was then properly entered upon the books of the bank (Tr. fol. 87). All of the foregoing transpired at the usual place of business of the defendant bank and during banking hours (Tr. fol. 80).

On February 1, 1907, plaintiffs duly tendered to the defendant bank the principal and interest due upon said note and demanded the certificate (Tr. fols. 56, 57). The bank refused to accept the money or to deliver the certificate upon grounds which will presently be stated (Tr. fols. 56, 57).

Shortly before the sale of the stock was made, Prather, the president of the bank, and certain of the directors sold all their stock in the bank to said Brown; and after January 2, 1907, Prather had nothing to do with the bank (Tr. fol. 107). On New Year's day, 1907, Brown called upon Palmer at his home and asked him to act as president of the bank, to which the latter gave his assent (Tr. fol. 116). On January 3rd, as already stated, the sale in question was consummated after consultation between Palmer and Brown (Tr. fol. 107). Though Brown was supposed to and did assume charge on January 2nd, the legal formalities necessary to fully install him as vice-president were not completed until two days later (Tr. fol. 107).

On January 4th (the day following the sale) the board of directors of the bank elected Brown a director and vice-president, and Palmer president to succeed Prather (Tr. fols. 90, 91). On January 8th the annual meeting f the stockholders was held, Brown, vice-president, presiding (Tr. fols. 89-91). On January 11th another meeting of the directors was held, Brown, Palmer and others

being present (Tr. fols. 92, 93). At none of said meetings was any action taken looking toward a repudiation or rescission of the sale.

On January 19th, the directors adopted a resolution reciting that Palmer had been "misinformed and misled" as to the value of the stock in question, and had acted beyond his authority in selling the same, and declaring said sale "repudiated, rescinded, vacated, set aside and annulled" (Tr. fol. 96). On January 21st, almost three weeks after the making of the sale, notice of the above was given George McBoyle, and tender was made him of the $1500 paid and the note (Tr. fols. 97, 98). McBoyle refused to accept either. The only evidence in the record on the subject of the value of the stock was given by McBoyle, who estimated it at $11,500, while frankly stating that this was mere conjecture on his part, and that it might be worth either more or less (Tr. fol. 78). Upon the last trial, all of the findings were in favor of defendants in error.

In the following pages, we shall endeavor to show, first, that the writ of error must be dismissed for want of jurisdiction, and, secondly, if we are mistaken as to this, that upon the merits, the judgment should be affirmed.

I.

The Case Is Not Within the Jurisdiction of This Court and the Writ of Error Should, Therefore, Be Dismissed.

This proposition will be considered under the following heads:

1. No title, right, privilege or immunity under the National Bank Act, or authority exercised under the United States, is here involved.

2. Plaintiffs in error failed to specially set up and claim their alleged title, right, privilege, immunity or authority, prior to the decision of the Supreme Court of California upon the first appeal.

These propositions will be considered in the order stated:

1. NO TITLE, RIGHT, PRIVILEGE OR IMMUNITY UNDER THE NATIONAL BANK ACT, OR AUTHORITY EXERCISED UNDER THE UNITED STATES, IS HERE INVOLVED.

It will be seen that the decision of the Supreme Court of California does not construe, or even refer to any statute of the United States; nor does the case concern any right protected by the federal constitution, treaties or laws. All that was involved in the state courts, and all that is here involved, is [redacted] the authority of an agent of a national bank, the scope and extent of whose authority does not depend upon any statute of the United States—for there is none on the subject—but upon the general principles of the law of agency. If, there-

fore, this case was properly brought to this court, it is evident that any cause arising either in tort or in contract involving the authority of any agent or employee of a national bank presents a cause within the jurisdiction of this court.

Section 5136 of the Revised Statutes, provides that a national bank association

"shall have power * * *

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed

Seventh. To exercise by its board of directors or duly appointed officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this Title.

But no association shall transact any business such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking."

The powers of the cashier, however, are not defined by any statute passed by Congress; and obviously the extent of his authority depends upon the particular facts involved, and varies with each case. As said by the Supreme Court of Washington, in *First National Bank v. Conway,* 151 Pac. 1120, "The powers of a cashier and manager of a bank must, of course, differ under different situations. Being the agent of the bank, his acts are governed by the general rule applicable to agents."

No question as to the *power* of a national bank is involved, for it is admitted by both parties that the bank possessed the power to dispose of the stock, but the question is merely as to the authority of an agent of the bank, under the particular facts shown by the record, to sell the stock without a formal resolution of authority passed by the board of directors. This question, obviously, depends for its correct decision upon principles of general law as applied to the particular facts of the case. On behalf of the defendants in error, it was claimed in the state courts, as we now claim: (1) that the cashier had such power under [redacted] the particular facts of the case; (2) that apart from such particular facts, a bank cashier—whether he be employed by a state or national bank—has general power to make a sale of such property; (3) that there was an implied ratification of the sale by the directors; and (4) that the bank is estopped to claim the

title to the stock. The Supreme Court of California in its opinion stated that it did not find it necessary to pass upon all of these points (162 Cal. 277). Clearly, however, it did not construe any law of the United States or deny to plaintiffs in error any right secured thereby. Indeed, no law of the United States was involved except in the remote sense that a statute of the United States authorizes the organization of national banks, and that, had this one not been organized, the question here involved would not have arisen. But to hold that this renders the case one arising under the laws of the United States would be to say that all controversies of every kind in which national banks may be involved may be ultimately brought to this court for decision. Since the Act of July 12, 1882, however, the law has been firmly established to the contrary.

Leather Manufacturers' Bank v. Cooper, 120 U. S. 778, 30 L. Ed. 816, 7 Sup. Ct. 777.

Petri v. Commercial Bank, 142 U. S. 644, 35 L. Ed. 1144, 12 Sup. Ct. 325.

Ex parte Jones, 164 U. S. 691, 41 L. Ed. 601, 17 Sup. Ct. 222.

As said by Judge Lowell in *American National Bank v. Tappan,* 174 Fed. 431, 433:

> "A federal question is not presented merely because in the course of the proceedings reference may be had to some federal statute. There must be shown a controversy concerning the meaning or application of the statute to give this court jurisdiction."

The methods whereby national banks may acquire and transfer property depend upon the State law, and, therefore, whether in any particular case property has been acquired or transferred by them, does not involve any Federal question. This rule was laid down in National Bank *vs.* Commonwealth, 9 Wall., 362, in the following language:

> "*They (national banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation,* and their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, are all dependent on State law. *It is only when the State law incapacitates the banks from discharging their duties to the Government that it becomes unconstitutional.*"

See also

Western Union Telegraph Company vs. Massachusetts, 125 U. S., 551.

White vs. Dowley, 94 U. S., 527, 533.

McClellan vs. Chipman, 164 U. S., 346.

First National Bank vs. Lamb, 50 N. Y., 96.

Prescott vs. Haughy, 65 Fed., 653.

(A suit against directors of a national bank based upon a violation of their common-law duties does not present a Federal question.)

The power of Congress to prescribe rules regulating the manner in which national banks shall

transfer their property may be doubted. That (granting the power) the greatest confusion would result from its exercise is manifest. Fortunately, the legislation enacted by Congress relative to national banks discloses no purpose to prescribe special or preferential rules for them, but, on the contrary, an intention to put them on an equal footing with State banks. Discussion of these matters seems, however, unnecessary, since clearly Congress has not declared that personal property of a national bank can only be transferred pursuant to a resolution of its board of directors.

Section 5136 of the Revised Statutes conclusively shows that the power of the directors in respect to such property is not exclusive or nondelegable, as contended by counsel for plaintiffs in error. By the seventh subdivision the incidental powers possessed by the bank may be exercised either by "its board of directors *or* duly appointed officers and agents." By subdivision five the duties of the cashier may be fixed by the directors, and by the sixth subdivision, the directors are given power to adopt by-laws regulating transfers of property of the bank.

In *Briggs vs. Spaulding*, 141 U. S., 142, 144, Chief Justice Fuller, delivering the opinion of this court, said:

> "When the banking act was originally passed and this bank was organized, that which is now subdivision seven of section 5136, does not contain the words 'or duly au-

thorized officers or agents, subject to law;' that is, the original act provided that the board of directors might exercise all such incidental powers as should be necessary to carry on the business of banking, as then specified, but said nothing about the exercise of their powers by the bank officers or agents. The words were inserted in the revised statutes, 1873, 1874. * * * Our attention has not been called, * * * to any duty specifically imposed upon the directors as individuals by the provisions of the act, although, if any director participated in or assented to any violation of the law by the board he would be individually liable. *The corporation after the amendment of* 1874 *had power to carry on its business through its officers.*"

That the powers of the board of directors in matters relating to the transfer of personal property is not exclusive or non-delegable see, also, the following:

Fleckner vs. U. S. Bank, 8 Wheat., 355.
Martin vs. Webb, 110 U. S., 7.
Auten vs. United States National Bank, 174 U. S., 125, 148.
Merchants Bank vs. State Bank, 10 Wall., 637.
Morse on Banks and Banking, p. 256.
Ricker National Bank vs. Stone (Okla.), 97 Pac., 577, 579.

Upon the same point, see:

Conde v. York, 168 U. S. 642, 42 Law Ed. 613, 18 Sup. Ct. 234.

Clearly, the case involves no question arising under any federal statute, but concerns merely the application of principles of the general law of agency to the particular facts of the case. As said by Mr. Chief Justice White in delivering the opinion of this court in *Crary v. Devlin,* 23 L. Ed. 510, in which a writ of error to the Circuit Court of Appeals of the State of New York was dismissed:

> "There could have been no decision of the Circuit Court of Appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation."

It is evident that the jurisdiction, if it exists, must be found in the clause of section 237 of the Judicial Code reading

> "or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States."

Now, it is well settled that a mere assertion of such authority is not sufficient. In the language of this court in *Millingar v. Hartupee,* 6 Wall. 258, 18 L. Ed. 829:

> *"The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States.* * * *
>
> In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute'. If a right were claimed under a treaty or statute, and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decision of a state court, that the right claimed did not exist."

Leyson v. Davis, 170 U. S. 36, 42 L. Ed. 939, 18 Sup. Ct. 500, was an action by the special administrator of the estate of Andrew J. Davis, deceased, to recover 950 shares of the capital stock of the First National Bank of Butte, which were claimed by the defendant under a *donatio causa mortis.* The District Court of the State of Montana for the County of Silver Bow gave judgment for the defendant, which judgment was affirmed by the Supreme Court of Montana. In dismissing the writ of error which was taken from said court, the Supreme Court said, per Mr. Chief Justice Fuller:

> "It is true that by Section 5139 of the Revised Statutes shares of the capital stock of national banks are declared to be personal property, 'transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association;'

and it is conceded by defendant in error that by one of the by-laws of defendant bank it was prescribed that its stock should be "assignable and transferable only on the books of this bank, subject to the restrictions and provisions of the banking laws, and transfer book shall be provided, in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board of directors by any stockholder who shall be liable, either as principal debtor or otherwise;' and that the certificates in question contained the provision: 'Transferable only by him or his attorney on the books of this bank on the surrender of this certificate.' * * *

We cannot perceive that any title, right, privilege, or immunity was specially set up or claimed by the administrator under a law of the United States and denied by the highest tribunal of the state, which is the ground of jurisdiction relied on. The controversy was merely as to which of the claimants had the superior equity to these shares of stock, and the national banking act was only collaterally involved. Conde v. York, 168 U. S. 642 (*ante,* 266); *Union National Bank v. Louisville, N. A. & C. Ry. Co.,* 163 U. S. 325 (41: 177); *Eustis v. Bolles,* 150 U. S. 361 (37: 1111)."

In *Le Sassier v. Kennedy,* 123 U. S. 521, 31 L. Ed. 262, 8 Sup. Ct. 244, Le Sassier & Binder had sold forty shares of the capital stock of Crescent City National Bank to one Kennedy, and in accordance with the prevailing custom at New Orleans he signed a transfer of the shares sold upon the transfer book of the bank, leaving the name of the transferee blank. Kennedy sold the stock to one Adams and at his request the transfer of the shares was made to one Dyer, who

was irresponsible, by writing his name in the blank left for the name of the transferee in the assignment which had been signed by Le Sassier & Binder. Upon the insolvency of the bank, the receiver brought suit against Le Sassier & Binder to enforce their individual liability as shareholders of the bank. The receiver having recovered judgment in the action, Le Sassier brought this suit against Kennedy alleging that upon the sale of the stock to him, it became his duty to insert his name in the assignment and that they had been compelled to pay the judgment in favor of the receiver "owing to the conduct of the said Kennedy in not causing his name to be inserted on the transfer book as aforesaid, as transferee of said stock, etc."

In dismissing the writ of error which had been issued to the Supreme Court of Louisiana, Mr. Chief Justice Waite, delivering the opinion of the court, said:

> "From this statement of the case it is apparent that the suit was not brought against Kennedy to enforce any liability of his under the National Banking Act. That liability was disposed of in the suit of the receiver against him for its enforcement. Neither do Le Sassier & Binder claim under the receiver, nor are they seeking to enforce the liability of Kennedy as a shareholder. Their claim, and their only claim, against him is for his failure to insert his own name, or that of some other responsible person, in the blank which had been left by them in the transfer they signed on the books of bank for the stock he had bought. *His obligation to them, if any there is, grows out of his*

contract with them as a purchaser, and not out of the banking law. That presents no federal question. There is nothing in that law which makes it his duty to save his assignors from harm by reason of their former ownership, or which required him to register his ownership for their protection."

Capital Bank v. Cadiz Bank, 172 U. S. 425, 43 L. Ed. 502, 19 Sup. Ct. 202, 204, was an action brought by the First National Bank of Cadiz, Ohio, against the Capital National Bank of Lincoln, Nebraska, and its receiver in the District Court of Lancaster County, Nebraska, to obtain a judgment that certain funds held by the latter were trust funds to which the plaintiff was entitled. The plaintiff obtained a judgment, which was affirmed by the Supreme Court of Nebraska upon appeal. In dismissing a writ of error taken by the defendant from said judgment, the Supreme Court, per Chief Justice Fuller:

"The record discloses no federal question asserted in terms, save in the application to the supreme court for a rehearing, when the suggestion came too late.

The petition did, indeed, allege that the Capital National Bank was organized under the banking act, and that a received was appointed, who took possession of the bank's assets, and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy; yet no right to appropriate trust funds was claimed by defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plain-

tiff would be in contravention of any provision of the banking act. * * *

We know of no provision of the banking act which assumes to appropriate trust funds in the possession of insolvent banks, or other property in their possession to which they have no title, and it is clear that the state courts had jurisdiction to determine whether this money was or was not a trust fund belonging to plaintiff.

The receiver made no effort to remove the litigation to the circuit court, contested the issues on a general denial, and set up no claim of a right under federal statutes withdrawing the case from the operation of general law.

In these circumstances the result is that this court has no jurisdiction to revise the judgment of the supreme court of Nebraska."

Chemical National Bank v. City Bank of Portage, 160 U. S. 646, 40 L. Ed. 508, 16 Sup. Ct. 417, was an action of assumpsit brought by the City Bank of Portage against the Chemical National Bank in the Superior Court of Cook County, Illinois. The declaration contained a special count upon a note signed by one Braden, which it was alleged was made by defendant in that name, and the common counts. The facts disclosed at the trial were briefly as follows: In 1893, the Chemical National Bank had taken some of its own stock in payment of a debt. Hopkins, the assistant cashier, gave his note to a firm of brokers secured by a part of this stock as collateral. The consideration for the note was paid to the bank. Shortly after the execution of the note, the holders demanded its payment, and it was

thereupon paid out of funds of the bank. It was then agreed between Curry, the president, Braden, the cashier, and Hopkins, assistant cashier, that the bank should raise $5000 through a broker in Minneapolis, by giving a note in Braden's name, payable to the broker, and with the stock as security, and that as the bank was to have the money, the note should be the bank's obligation. The broker discounted the note at the City Bank of Portage, and the consideration was paid to the Chemical National Bank.

The defense was that the purchase by the bank of its own stock was illegal; that it was equally illegal for the bank to borrow money to replace money paid out in making such purchase; and that plaintiff could not recover for the further reason that the money was obtained and used for a purpose forbidden by United States Revised Statutes, section 5201. The Superior Court gave judgment for the plaintiff, which was affirmed by the Supreme Court of Illinois.

This court dismissed a writ of error which had been issued to the Supreme Court of Illinois, upon the ground (among others) that

> *"the question of liability, whatever the authority of these bank officers to borrow this money for the bank, depended upon general principles of law applicable under the particular facts".*

It is therefore respectfully submitted that the record fails to show the existence of any federal

question, and that the writ of error must therefore be dismissed.

2. PLAINTIFFS IN ERROR FAILED TO SPECIALLY SET UP AND CLAIM THEIR ALLEGED RIGHT, PRIVILEGE OR IMMUNITY UNDER THE NATIONAL BANK ACT, OR AUTHORITY EXERCISED UNDER THE UNITED STATES, PRIOR TO THE DECISION OF THE SUPREME COURT OF CALIFORNIA UPON THE FIRST APPEAL.

Neither in the original answer nor in any of the proceedings had prior to the rendition of the first judgment of the Supreme Court of California was any claim made that a federal question was involved. Not until the amended answer was filed after the judgment of the Supreme Court became final and the remittitur had gone down was this contention advanced. The argument and discussion in the case up to that time did not concern any claim that the construction of a federal law or the existence of any right conferred by any statute of the United States was involved, but on the contrary was confined entirely to the questions pertaining to the general law of agency, ratification and estoppel. Neither does the opinion of the Supreme Court on the first appeal make any reference to any claim of the existence of a federal question.

It was only after the question of the extent of Mr. Palmer's authority had been decided by the Supreme Court and the "law of the case" on that subject had been established that the claim was

advanced that the case involved any federal question. On January 13, 1913,—almost a year after the rendition of the judgment of the Supreme Court of California—plaintiffs in error filed their amended answer, wherein they alleged "that said cashier had no power or authority to sell said land and

Moreover, the opinion of the Supreme Court of California upon the second appeal shows that its judgment was supported upon two distinct grounds, viz., (1) that the "law of the case" had been fixed upon the first appeal, upon which, as has been shown, no Federal question was raised or decided (see *Westerfeld vs. New York Life Insurance Co.*, 157 Cal., 342); and (2), that the views expressed by the court upon the first appeal were correct. Since it cannot be claimed that the first ground alluded to involved the decision of any Federal question, it is respectfully submitted that for this reason also the writ of error should be dismissed.

Allen vs. Arguiman, 198 U. S., 149.

It may be added that the fact that one of the plaintiffs in error is the receiver of a national bank does not entitle him to prosecute this writ of error.

Capital Bank vs. First National Bank, 172 U. S., 425.

Bausman vs. Dixon, 173 U. S., 114.

II.

The Bank Was Bound by the Sale Made by Palmer.

The trial court has found—and its findings are approved by the Supreme Court of California (Tr.

fol. 141; 168 Cal. 264)—that Palmer "possessed full power and authority to make such sale on behalf of said defendant bank, and said sale was a valid act of said defendant bank, and was and is binding upon it" (Tr. fol. 54); and further that plaintiff "was on the 3rd day of January, A. D. 1907, and ever since has been, and now is, the owner of said 599 shares of the capital stock of said Burnham-Standeford Company and of certificate number 59 representing said shares" (Tr. fol. 57). It is hardly necessary to say that the presumptions are all in favor of the validity of the judgment, and that if there be any substantial evidence to support these findings, the judgment must be affirmed. That the evidence fully supports said findings, we shall now endeavor to show.

This subject will be considered under the following headings:

(1) Under the particular circumstances shown by the record, it was within the powers of the cashier to make the sale in question; (2) apart from such special circumstances, the sale was within the general powers possessed by cashiers of either state or national banks; and (3) conceding, solely for the purposes of the argument, that Palmer exceeded his powers in making the sale, the evidence establishes an implied ratification thereof.

(1) UNDER THE PARTICULAR CIRCUMSTANCES UNDER WHICH THE SALE IN QUESTION WAS MADE, IT WAS WITHIN THE POWERS OF THE CASHIER.

This subject will be considered under two headings.

(a) The re-sale of the stock was an act "necessary in the management of the business of the bank" within the meaning of the by-law, since it was made for the purpose of enabling the bank to realize upon the Burnham loan.

By the by-laws of the bank, the powers of the cashier are thus defined:

> "The cashier shall have power to discount and purchase bills, notes and other evidences of debt, to buy, and sell bills of exchange, and to issue certificates of deposit. He shall have general charge and supervision, subject to the advice and control of the president and directors, of the affairs of the bank, *and shall be generally authorized to do whatever may be necessary in the management of the business of the bank.* He shall, at any meeting of the directors or stockholders, make a full report embracing a general review of the transactions and business of the bank from the date of the last previous report, to the time of such meeting, and upon application furnish information pertaining to the business" (Tr. fol. 103).

In the brief for plaintiffs in error much reliance is placed upon the circumstance that the title of the stock had passed to the bank prior to the sale in question, and it is claimed, in effect, that therefore it was held by the bank as an *investment* and was subject to the rules relating to property so held (Brief for Plaintiffs in Error, p. 22). It is necessary, therefore, that the nature of the business involved in the transaction under discussion and the source and origin of the bank's power to engage therein should be considered. From what source do national banks derive the power to make sales

of stock purchased by them in the enforcement of pledges? The question has been exhaustively considered by this court in a line of decisions which establish that the authority of national banks to purchase and sell stock follows from the authority conferred upon them by the National Bank Act *to lend money and collect the same.* In the language of Mr. Chief Justice White, in *California Bank v. Kennedy,* 167 U. S. 366:

> "No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, *as incidental to the power to loan money on personal security,* a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and, by the enforcement of its rights as pledgee, it may become the owner of the collateral, and be subject to liability as other stockholders. Bank v. Case, 99 U. S. 628. *So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness.* It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. First National Bank v. National Exch. Bank, 92 U. S. 128."

Concord etc. Bank v. Hawkins, 174 U. S. 366;

First National Bank v. Converse, 200 U. S. 438;

Merchants Natl. Bank v. Wehrmann, 202 U. S. 301.

The selling of this stock, then, was merely the exercise of a power incidental to the power of the

bank to collect money due it; and in making the sale in question, Palmer was but exercising one branch of the bank's power of collection,—a function which every authority which considers the subject, declares is within the legitimate sphere of the cashier. "A cashier", says Morse (*1 Morse on Banks and Banking*, Sec. 137) "has authority *virtute officii* to collect debts due the bank * * *" (see also Brief for Plaintiffs in Error, p. 6), where it is said "We do not question the power of a bank cashier to loan and borrow money, to transfer negotiable paper", etc. If, therefore, the bank could lawfully make a sale of this stock,—and it must be conceded under the authorities cited, it could do this in the exercise of its power of collection—it cannot be denied that the cashier was the proper person to represent it in such transaction.

The bank had lent money to Burnham and had secured the same by a pledge of this stock. The purpose and intention of both parties was that the money should be repaid with interest. Payment was delayed, however; and finally, the bank in the exercise of the "incidental power" spoken of in the decisions referred to took the stock. As pointed out in the opinion of the Supreme Court of California, however, this, as also the sale which followed, were mere steps and incidents in the collection of the money due. The stock was carried upon the bank's books at $10,500, the amount of the Burnham loan with interest, and when Palmer made the sale he collected this amount with $500

additional for interest, as he expressed it (Tr. fol. 155), and the transaction was so entered in the bank's books. As shown by the authorities cited, *the bank only possessed the power of sale as an incident of its power to collect money due it, and when this power was exercised by the officer possessing the power of collection, it cannot be successfully claimed that the latter's act did not bind the bank.*

The acquisition of the title to the stock by the bank wrought no change in the real nature of the transaction. The stock was never held permanently *and could not legally be so held* (see *First National Bank v. National Exchange Bank*, 92 U. S. 122). The only excuse for the bank's being in possession of it was the Burnham loan, and the fact that it was a means whereby the bank might ultimately be made whole for the money advanced to Burnham.

It was with this end in view that Mr. Palmer, the managing head of the bank, transferred the stock to the plaintiff for $11,000, charging the latter, as he said, $500 by way of interest. "That", said Palmer to McBoyle at the time the sale was first discussed between them, "represents $10,500 on our books" (Tr. fol. 74). When McBoyle offered this sum for the stock, Palmer replied, "If I sell it to you for $10,500 I have got nothing for interest". And then McBoyle replies, "I will give $500 more for interest", and the bargain is closed (Tr. fols. 74, 75). The sale, therefore, was clearly made for

the purpose of recouping upon the Burnham loan, and the entries in the books of the bank so show.

If, then, as contended by defendant's counsel in the state court, the test be whether the act of the cashier is done with a view of collecting money advanced by the bank, Mr. Palmer's authority in the present case must be conceded, for that was his only purpose in making the sale. Moreover, he accomplished that purpose, for the bank received the full amount it had lent Burnham, together with interest.

In the case at bar, there was, in effect, a continuing command of the statute upon the bank to sell the stock. All of the officers of the bank knew this. The Bank Examiners had themselves called it to their attention and had severely criticized them for holding it so long (Tr. fols. 73, 74). The bank had never held the stock as an asset, or as an investment, and had no power so to do. On the contrary, it held and afterwards sold it, pursuant to its power and duty to collect the amount due on the Burnham loan. It is impossible to escape the conclusion that in so doing it was performing a function properly appertaining to the office of cashier, for as already pointed out, *he is the collecting officer of the bank.* And who but the collecting officer should exercise the power of collection?

We pass, now, to a consideration of certain other circumstances in the case which, we submit, of themselves, fully justify the finding of the trial court that the said Palmer "possessed full power and

authority to make such sale on behalf of said defendant bank, and said sale was a valid act of said defendant bank and was and is binding upon it" (Tr. fol. 54).

(b) The directors had left to Palmer the entire control of the affairs of the bank, and at the time of the sale he was the only officer through whom the business of the bank could be transacted.

As already stated, the sale was made through Palmer, the cashier and secretary, after consultation with, and with the approval of, J. Dalzell Brown, who had recently acquired the stock of Prather, the president, and that of other stockholders and directors (Tr. fols. 115, 117, 90, 91). Palmer had occupied the position of cashier for twenty-five years (Tr. fol. 121), and during that period had frequently transacted business on behalf of the bank with McBoyle (Tr. fol. 82). The evidence bearing upon the subject of the purchase of the bank stock by Brown having already been referred to will not be here discussed in detail.

The only inference which can be drawn from the evidence is that on January 3rd, the day the sale was made, Palmer not only possessed the most extensive powers of any officer of the bank (a cashier's powers, as will presently be shown, are held to be more extensive than those of any other officer of a bank), but he was the *only* officer through whom the business of the bank could be transacted. He was the person upon whom the president and

the directors who had just sold their stock to Brown had placed the sole responsibility of conducting the affairs of the bank pending the reorganization. It was necessary either that he should transact such business of the bank as arose, or that it should close its doors.

Under the terms of the purchase, Brown was to assume control on January 2nd (Tr. fol. 107); and after that date Prather, the president, had nothing more to do with the bank (Tr. fol. 107). The formalities necessary to complete the transaction, however, occupied a day or so longer (Tr. fol. 118); and it was therefore not until the 4th that Palmer was actually installed as president, in accordance with the promise made him by Brown on New Year's day (Tr. fols. 116, 117).

The cashier was authorized by the by-law above quoted to do whatever should "be necessary in the business of the bank". The general charge and supervision of its affairs thereby conferred upon him was subject, it is true, to "the advice and control of the president and directors". But here, neither directors nor president had interposed, or sought to control in any way the action of the cashier. Indeed, by the sale of their stock they had disqualified themselves from lawfully assuming such control. The condition of affairs which existed at the time the sale was made was thus brought about by the joint action of the old management and the new. Both had decreed that the business of the bank should go on intermediate the sale

and the reorganization and had left Palmer in charge during said period. Upon the plainest principles of justice, therefore, we submit that they must be bound by his action, which was taken by him (as is admitted on all sides), in the highest good faith and for the best interests of the bank (Tr. fol. 110).

In *First Natl. Bank v. Conway* (Wash), 151 Pac. 1134, it was said:

> "The powers of a cashier and manager of a bank must, of course, differ under different situations. Being the agent of the bank, his acts are governed by the general rules applicable to agents. *If the directors of the bank entrust the entire management of the bank to such an officer, they cannot be heard to deny his authority to do any act which they might lawfully authorize him to do.*"

Similarly, in the case at bar, we respectfully submit that in view of the circumstances alluded to, under which the sale in question was made, neither the bank nor its receiver should be permitted to deny its binding effect.

2. APART FROM THE SPECIAL CIRCUMSTANCES WHICH HAVE BEEN REFERRED TO, THE SALE WAS WITHIN THE GENERAL POWERS POSSESSED BY CASHIERS OF EITHER STATE OR NATIONAL BANKS.

In *Simonton on the Law of Checks, Notes and Banks*, p. 41, it is said:

> "The cashier of a bank is held to have more inherent power than any other officer and almost every act of his relating to the conduct of the affairs of the bank are binding on it."

In *2 Cook on Corporations*, sec. 718, the author lays down the same rule, saying:

> "The cashier of a bank has greater inherent powers than any other corporate officer."

In *Magee on Banks & Banking*, sec. 134, the same is true:

> *"The cashier by the very nature of his office has charge of all the personal property of every nature belonging to the bank.* * * *
>
> *He is also charged with the care and safekeeping of all the notes, bonds, bills and other securities and valuable papers belonging to the bank and may, when the necessity arises, during the ordinary course of business,* **sell, transfer** *and* **dispose** *of the same, and, it will be resumed, until the contrary is shown, that he sold the same on behalf of the bank and was authorized to do so by the directors or that they ratified his act.* * * *
>
> *"Having charge of the personal property of the bank, persons dealing with him in his capacity as cashier, may assume that he has authority to dispose of the property, and in the ordinary transactions and dealings with him, such person is not required to inquire into the limitations and restrictions placed upon him or his authority."*

In *Morse on Banking*, sec. 158, which is extensively quoted from in the brief for plaintiffs in error, pages 7, 13, the same rule is laid down, the author stating:

> *"The cashier has full charge of the bank's personal property, except so far as withdrawn from his control by the bank or by the directors.*

> *"The cashier has full charge, and* **power of disposition** *in the regular course of business, of all personal property of the bank, whether specie, notes, bills, bonds, securities, valuable papers, or of whatsoever other description of personal property the bank may have in its possion."*

In *2 Thompson on Corporations*, sec. 1530, the author quotes with approval the following language of Judge Story in *Wild v. Bank*, 3 Mason 505; 29 Fed. Cas. 17,646:

> "The cashier of a bank, is *virtute officii*, generally entrusted with the notes, securities and other funds of the bank, and is held out to the world by the bank as its general agent in the negotiation, management and *disposal* of them."

The same author states (*2 Thompson on Corporations*, sec. 1531):

> "The cashier has implied power to receive deposits and pay them out in the usual course of business on checks and drafts; to certify checks and issue certificates of deposit; to draw, accept or endorse bills or drafts in the usual course of business; to receive notes for collection; to endorse for collection the paper of the bank, or that which has been deposited for collection, or as collateral; to renew notes or extend the time of payment, *to sell, transfer and endorse negotiable paper, stock and other securities held by the bank;* to borrow money when necessary in the usual course of business; to compromise claims; to transfer a judgment; to guaranty a note or the priority of a mortgage transferred by him for the bank; to release a debt and mortgage; to institute suits; and to employ an attorney."

In *Fleckner vs. U. S. Bank,* 8 Wheat., 338, 360, it was said by Mr. Justice Story:

> "The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time, for the ordinary and extraordinary exigencies of the bank. * * * In short, he is considered the executive officer, through whom, and by whom, the whole moneyed operations of the bank in paying and receiving debts, or discharging or *transferring* securities, are to be conducted."

In *Merchants Bank vs. State Bank,* 10 Wall., 604, 650, it was said:

> "The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and *transfers* its commercial securities. * * * The directors may limit his authority as they deem proper, but this could not affect those to whom the limitation is unknown."

And at page 644 it is said:

> "Where a party deals with a corporation in good faith—the transaction is not *ultra vires*—and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists."

See also

Case vs. Bank, 100 U. S., 446, 454.

Matthews vs. Massachusetts National Bank, 1 Holmes, 396, 500.

Hanover National Bank vs. First National Bank, 109 Fed., 421.

Ida County, etc., Bank vs. Johnston, (Ia.), 136 N. W., 225, 228.

In *Story on Agency,* sec. 114, the author says:

> "The cashier of a bank is usually entrusted with all the funds of the bank, in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank * * * In short, he is considered as the executive officer, through whom and by whom the whole moneyed transactions of the bank, in paying and receiving debts and discharging and **transferring** securities, are to be conducted."

In *21 Ency. of Law,* p. 862, the rule is thus stated:

> "The cashier of a bank is ordinarily its chief executive officer, through whom the financial operations of the bank are conducted. * * * He receives and pays out its money, collects and pays its debts, and receives, discharges and **transfers** its commercial securities."

Bartlett Estate Co. v. Wymeken, 11 Cal. App. 373, 105 Pac. 130, was an action on a non-negotiable note executed by the defendants in favor of the People's State Bank and assigned by the latter to plaintiff. The assignment was executed by the president of the bank, but there was no proof that he had been authorized by the board of directors to make the same.

In affirming a judgment in favor of plaintiff, the District Court of Appeal for the Second District said, per Allen, P. J.:

> "The Court found in favor of plaintiff upon the issue as to the assignment and transfer of the obligation the basis of the action. Appel-

> lant contends that there is no evidence in the record to sustain this finding of the Court. There is evidence that the bank to whom the note was made payable received a consideration for its transfer; that the assignment was made in the name of the bank by its president eight months before suit was brought. * * * The reason for the rule that through banking usage the president's power was limited to transactions expressly authorized by the board of directors no longer obtains, and the rule should cease."

Dollar v. International Banking Corporation, 13 Cal. App. 331, 109 Pac. 499, was an action by the endorsee of a deposit receipt to recover money deposited with the banking house of defendant located in Hongkong. The receipt was issued to the American Commercial Co., a corporation, and was endorsed by the manager of said company to the plaintiff. The defendant claimed that this transfer was of no effect because it had not been authorized by the directors of the American Commercial Co.

In overruling this objection, the District Court of Appeal for the Second District said, quoting from *McKiernan v. Lenzen,* 56 Cal. 64:

> "The result of the cases seems to be, that where the management of the affairs of a corporation is intrusted to a general managing agent, he has power to assign the choses in action of the corporation to its creditors, either in payment of, or as security for the payment of, a precedent debt of the corporation, without express authority from the board of directors, and an assignment so made is valid. The presumption is, that the assignment was made by

one having competent authority. *No special resolution authorizing him to act in this respect was necessary.* (*Tuller v. Arnold,* 98 Cal.; *Greig v. Riordan, supra,* p. 323.)"

In *Carpy v. Dowdell,* 115 Cal. 677, 47 Pac. 695, in upholding the action of a bank cashier in selling wine mortgaged to the bank, this court quoted with approval the following language of the Supreme Court of the United States in *Dickerson v. Colgrove,* 100 U. S. 580:

> "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is strictly forbidden. It involves fraud and falsehood, and the law abhors both."

In *Greig v. Riordan,* 99 Cal. 316, 33 Pac. 913, it was said:

> *"There was a period in the history of corporations when the most ordinary transactions were required to be authorized by solemn resolution of the board of trustees, duly entered in their records, and authenticated by the corporate seal. With the multiplication of corporations having for their object nearly every business pursuit known to modern times, the formalities previously regarded as necessary, and which were illy adapted to pursuits requiring prompt action, have been greatly abridged.*
>
> " 'Corporations,' says Bronson, J., in *Gillett v. Campbell,* 1 Denio 522, 'like individuals, may appoint agents, and make most of the contracts which fall within the scope of their general powers without the use of a seal; the

rule was once otherwise, but that day has gone by.'

"The case in which the above language was used was one in which the president and cashier of a bank, for the purpose of securing a debt owed by the bank, had assigned a debt due to the bank, and it was objected that no authority to make the assignment had been shown by the by-laws of the company or a resolution of the board of directors, and the validity of the assignment was upheld.

"*McKiernan v. Lenzen,* 56 Cal. 61, was in many respects similar to the case at bar, and the power of the general manager to assign a book account for lumber sold by the corporation to a creditor of the corporation, in payment of an existing debt, was upheld.

"*Waterman on Corporations,* at section 30, says: 'As a general managing agent and superintendent is the representative of the corporation, and may do in the transaction of its ordinary affairs what the corporation itself could do within the scope of its powers, he may assign the chose in action of the corporation to its creditors either in payment of or as security for the payment of a precedent debt of the corporation, without express authority of the board of directors.'"

In *Preston v. Central California etc. Co.*, 11 Cal. App. 190, 200, 104 Pac. 462, the validity of a transfer of an account made by the manager of a corporation without resolution of the board of directors was upheld, Justice Hart saying:

"It will not be doubted that the manager of a corporation may, for such corporation, perform any act within its ordinary business transactions and affairs. And it cannot be

> questioned that an assignment of an account for transporting freight by the manager or superintendent of a railroad corporation, or for merchandise sold by a mercantile company, involves anything beyond the transaction of the ordinary affairs of such corporation or mercantile company."

The case of *Bank of Vergennes v. Warren* (N. Y.), 7 Hill 91, in many particulars is not unlike the case at bar. The Farmers' Bank of Orwell, Vermont, having recovered a judgment against one Mason, execution was levied upon certain hay and crops belonging to the latter, and the property was sold to said bank. Thereafter, the cashier of the last-named bank executed an assignment of the sheriff's certificate of sale to the plaintiff bank, upon receiving the amount of the judgment and interest. The cashier testified that when he executed the assignment no vote of the directors had been taken authorizing him to make it, nor did he know that any vote was necessary. The action was replevin by the plaintiff bank against a purchaser at a subsequent execution sale.

In reversing a judgment against plaintiff based upon an order of nonsuit, the Supreme Court of New York said, per Mr. Justice Bronson:

> "It is said that the cashier of the Farmers' Bank had no authority to transact such business; that the plaintiffs should have gone to the board of directors. *But it is enough that the plaintiffs went to the banking-house in business hours, and there made the payment to one of the principal agents of the corporation, who, by*

accepting the money, professed to have authority to receive it. His authority will be presumed until the contrary expressly appears. Bk. v. Kortright, 22 Wend. 348; *Lovett v. Steam Saw-Mill Assn.,* 6 Paige 54. Indeed, I think it would not defeat the purchase if it could be shown that the cashier had been forbidden by his principals to transact such business. A creditor, having the right to purchase from a corporation, must of necessity have the right to deal with the principal officer or agent of the company who may be found at its place of business."

First Nat'l Bank v. Greenville etc. Co. (Tex.), 60 S. W. 828.

The plaintiff in this case sold cotton-seed meal to one Ingram, and the defendant bank, by its cashier, pursuant to an arrangement made by him with Ingram, agreed with plaintiff to pay the latter the purchase price of the meal. The action was against the bank upon this contract. One of the defenses was that the cashier had no authority to enter into this contract on behalf of the bank.

In affirming a judgment in plaintiff's favor, the Court of Civil Appeals of Texas said, per Mr. Justice Bookhout:

"It is insisted that the cashier acted without the authority of the bank in making the contract with plaintiff. *The cashier of a bank is an executive officer, through whom the whole financial operations are conducted. Where one deals with the cashier of a bank in good faith, and without any notice of want of authority on his part, and the act done is within the appar-*

ent scope of his authority, the party so dealing may enforce the contract against the bank. Bank v. Martin, 70 Tex. 643, 8 S. W. 507; Merchants' Nat. Bank v. State Nat. Bank, supra. Where an officer of a corporation assumes to have power to bind the corporation, and enters into a contract for the corporation, and the corporation receives the fruits and benefits of the contract, and retains them with knowledge of the circumstances attending the making of the contract, it is estopped from rescinding or undoing the contract. 5 Thomp. Corp. sec. 5258."

In *First Nat'l Bank v. Anderson* (Ind. Ty.), 82 S. W. 695, the court said:

> *"The duties of a cashier, and his authority to bind the bank, are of the largest possible scope. 'The cashier is the general executive officer of the bank. He is the general agent of the bank in dealing with its customers, and the general rule resulting from his situation is that his contractual acts bind the bank, unless they are contrary to law, or to what stands for the bank's charter, or to public policy. He is not the agent of the board of directors, but of the bank itself. His general powers are not affected by statutes or charters which require the agreements or contracts of the bank to be executed in a certain way."*

Carr v. National Bank etc. Co., 167 N. Y. 375, 60 N. E. 649, 82 Am. St. Rep. 725, was an action to rescind, on the ground of fraud, a transaction in which the defendant bank had sold plaintiff certain bonds belonging to the former. The sale was made by one Sherman, who was president of the bank.

In affirming a judgment in plaintiff's favor, the New York Court of Appeals said, per Mr. Justice Gray:

> "The appellant argues that what Sherman did was his individual act, for which it should not be held responsible; and, further, that as it could not, being a national bank, engage in the business of buying and selling securities, its officers could not subject it to any liability by reason of such transactions. *It is sufficient to say, in answer to that objection, that the plaintiff did not know that she was dealing with the defendant through Sherman as one of its officers, and that, whatever the limitations upon its powers, they cannot interfere with the just operation of the rule in equity which forbids a principal from reaping any benefit from the wrongful act of his agent.*"

In *First Nat'l Bank v. First Nat'l Bank of Newport* (Ala.), 22 So. 976, the court uses the following language:

> "The cashier of a bank as its general executive officer, whose office is to manage all the affairs of the corporation not peculiarly committed to the directors. *By his induction into the office he is held out to the world as having authority to act according to the general usage, practice, and course of business of banking institutions, and any act of his within the scope of the usage, practice, and course of business of such institutions will, therefore, bind the corporation in favor of third persons who did not know that he was acting beyond the scope of the express authority conferred upon him by his principal.* The public at large usually have no other knowledge of the powers of the cashier of a particular bank than such as is derived

from the usage and practice of banks in general; and, even though his power may be expressly limited by the directors, such limitation will not affect those to whom it is unknown, if the transaction was one within the scope of the ordinary course of business of banking institutions. 1 Morse, Banks, sec. 171 (d); Case v. Bank, 100 U. S. 454; Merchants' Bank v. State Bank, 10 Wall. 650; Lloyd v. Bank, 15 Pa. St. 172."

Security Savings Bank v. Smith (Ia.), 119 N. W. 726, was an action upon a promissory note executed by one Kreger, the principal debtor, and E. L. Smith and A. L. Palmer, his sureties. The latter defended upon the ground, among others, that after the note had become due they learned of Kreger's financial straits and informed the bank of certain property owned by Kreger, against which they said they intended to commence legal proceedings to protect themselves from loss. To this, the cashier of the bank responded that they need give themselves no further trouble, that the bank itself would commence such proceedings. In point of fact the bank then held other unsecured claims against Kreger, and instead of proceeding to satisfy the claim on the note out of said property, it commenced and prosecuted to final judgment an attachment suit, wherein was included, not merely the claim in question, but all its other claims against Kreger. The case (so far as is here material) turned upon the authority of the cashier to make the agreement above mentioned.

Speaking upon this subject, Mr. Justice Weaver said:

> "We are quite clear that, in the absence of special restriction known to the party with whom he deals, the apparent scope of such authority is broad enough to include the acts and agreements alleged by the defendants in this case. *As a matter of common knowledge the cashier is ordinarily the active financial manager and agent of the bank. He is the one officer who as a rule is always present during business hours exercising actual and immediate supervision of its affairs. He is the officer with whom the customers of the bank come most frequently in contact. Among other things, it has been held that he may compromise a debt due the bank* (*U. S. Bank,* 21 How. 356, 16 L. Ed. 130; *Young v. Hundson,* 99 Mo. 102, 12 S. W. 632; *Corser v. Paul,* 41 N. H. 24, 77 Am. Dec. 753; *Stebbins v. Lardner,* 2 S. D. 127, 48 N. W. 847; *Bank v. Dick,* 73 Mo. App. 354); *may institute suits and attachment proceedings in the name of the bank* (*Bank v. Whitmore,* 40 Hun (N. Y.) 499); *may employ an attorney to bring suit* (*Eastman v. Bank,* 1 N. H. 23; *Southgate v. Railroad Co.,* 61 Mo. 89; *Root v. Olcott,* 42 Hun (N. Y.) 526); *and may take such other measures as are reasonably adequate to obtain the collection or account of debts due the bank* (*Bridenbecker v. Lowell,* 32 Barb. (N. Y.) 9)."

In *Johnson County v. Chamberlain* (Neb.), 113 N. W. 1055, it was held (to quote from the syllabus) that:

> "The cashier of a bank is the proper officer to execute a bond on its behalf to secure a deposit of public money made therein, and the bank will be bound by such execution, in the absence of some rule or regulation adopted by

> the directors or stockholders requiring special authority on the part of the cashier to execute such bonds, and notice of such fact brought to the attention of the obligee therein."

In *The National Bank v. Equitable Trust Co.* (Pa.), 72 Atl. 794, it was held that the act of a national bank cashier in falsely certifying on its behalf, in response to a request of a fidelity company, that a bookkeeper in the employ of the bank had performed his duties in an acceptable and satisfactory manner, was within the power of said cashier and that the bank was bound thereby.

In *Arnold v. National Bank* (Wis.), 105 N. W. 828; 3 L. R. A. (N. S.) 580, the Supreme Court of Wisconsin, in holding that a bank cashier had power to bind the bank to pay a commission for the sale of real estate acquired by the bank in the collection of its credits, said, per Dodge, J.:

> "It is essential to the community that those dealing with business corporations should be able to hold them to the same civil responsibility for their acts as individuals would be held for similar ones. * * * When business is conducted by a corporation, safety and justice require that it be held to the same responsibility as an individual for the individual act involved."

See also:

Sherwood v. Home Savings Bank (Ia.), 109 N. W. 9;

Steinke v. Yetzer (Ia.), 79 N. W. 286;

First National Bank v. Anderson (Ind. Ty.), 82 S. W. 693;

National Bank v. Friedenberg (Pa.), 55 Atl. 960;

Citizens Bank etc. Co. v. Thornton, 174 Fed. 752, 760;

Everett v. U. S., 6 Porter 584; 30 Am. Dec. 584;

Power v. Woolfolk (Mo.), 111 S. W. 1187;

Citizens Bank v. Weakley (Ky.), 103 S. W. 249; 11 L. R. A. 598;

Hindman v. First National Bank, 112 Fed. 931; 57 L. R. A. 108.

In view of the foregoing, we respectfully submit that if the case stood merely upon the general law relative to the powers of bank cashiers, the conclusion would be inevitable that the sale in question was properly made and bound both parties. But, as already pointed out, a consideration of the special facts connected with and surrounding the transaction lead to the same conclusion. The act of the cashier in its real nature pertained to the power of collection—in respect of which the authority of the cashier is everywhere acknowledged to be of the widest scope. Besides, the sale by Prather and the other directors who joined with him in selling their stock had resulted in Palmer being placed in entire control of the affairs of the bank pending the reorganization. It was during this interregnum that the sale in question was made. Before closing the transaction, Palmer consulted with and obtained

the consent of the only person with whom he could properly consult and the one principally interested, that is, Brown.

We respectfully submit, therefore, that in view of the foregoing, neither the bank nor its receiver, and certainly neither the new directors and stockholders nor the old ones, can be heard to assail the validity of a sale so fairly entered into on the part of defendants in error.

We pass, now, to a consideration of the authorities cited in the brief of plaintiffs in error, in support of their claim that the sale in question was a nullity for want of authority in Mr. Palmer to make it.

Inasmuch as all of the authorities, save one, cited in support of the statement made in *5 Cyc.*, 475 (see Brief for Plaintiffs in Error, p. 15), are cited and relied upon by plaintiffs in error and are considered in the following pages, it will be unnecessary to here review them. The case referred to in said work, which is not cited by respondents (*Tennessee v. Davis*, 50 How. Pr. 447) would appear to be an authority in our favor, though it is so poorly reported as to be of little assistance.

In the case of *United States v. City Bank of Columbus*, 21 How. 35, upon which respondents particularly rely, the United States sued upon an alleged contract entered into by it and one Miner,

acting for the defendant bank, whereby the bank undertook to transfer $100,000 from New York or Philadelphia to New Orleans within a specified period. The $100,000 was paid by the Treasury Department to Miner, but what he did with the money the record does not show. At any rate he did not transmit it as agreed, and the action followed. The claimed authority of Miner to represent the bank was founded upon a letter addressed to the Secretary of the Treasury by one Moodie, the cashier of the bank.

The only question involved was as to the power conferred upon Moodie by this letter. It was held that the cashier could not depute this authority. There is nothing in the case to show that had the cashier himself entered into the arrangement with the Treasury Department, the bank could have escaped the effect of the same. The case is authority only for the proposition that the cashier cannot lawfully delegate his powers to another.

Martin v. Webb, 110 U. S. 7, so far from being an authority in respondents' favor, we think is one in ours.

In that case, the Davies County Savings Association had advanced money to one Kenney secured by deeds of trust of certain lands owned by Kenney. The property was incumbered also by a deed of trust executed by Kenney and his wife to James D. Powers, and certain judgments were also a lien thereon.

Under these circumstances, Tomlin, the cashier of the bank, arranged that certain New York trustees, in consideration of their obtaining a deed of trust executed by Kenney upon said lands, which said deed of trust should be a first lien thereon, should advance money to Kenney with which to pay a portion of his indebtedness. In pursuance of this arrangement, Kenney paid and satisfied the liens upon said lands, and paid the indebtedness to the bank. Tomlin, acting on behalf of the latter, cancelled the note evidencing this indebtedness and the trust deeds given to secure the same, and took from Kenney a new note secured by deed of trust subject to that of the said trustees.

The evidence shows that the president of the association was absent in Colorado while the foregoing was done, and that Tuggle, another director, resided some distance from Gallatin, where the bank was located, and gave little attention to its affairs. The management of the bank during this period (as was the fact in the case at bar during the change of management) was left with the cashier.

In a suit to foreclose brought upon the trust deeds originally held by the bank and afterwards cancelled by the cashier, as just stated, it was held that the latter's act was binding upon the bank. The court expressly recognized the doctrine contended for by us in the case at bar that the authority of the officer in question "may be implied from the conduct or the acquiescence of the corporation, as represented by the board of

directors", and in fact made that principle the turning point of its decision.

In *Bank of Commerce v. Hart* (Neb.), 20 L. R. A. 780, the only question involved was the power of the bank cashier to purchase stocks of an insurance company; a thing which the law prohibited the bank itself from doing. The court drew a distinction between the power of a bank cashier to *collect* and his power to "discharge the debts due his bank by exchanging the evidences of them for stocks of an insurance company". The conclusion reached is that while he possesses the first mentioned power in its fullest extent, he does not possess the last. It may be here repeated that the action taken by Palmer was with a view of realizing upon the Burnham loan. In its real nature it was the exercise of the power to collect.

In *Leggett v. N. J. Manufacturing & Banking Co.*, 1 Saxton Ch. 541, 23 Am. Dec. 729, the question involved related to the power of the cashier and president to execute a mortgage of real estate belonging to the bank. The mortgagees were fully advised as to the want of power of these officers under the by-laws. The court held the mortgage was not binding upon the bank, and in the course of the opinion used the following language:

> "* * * the cashier is usually intrusted with all the funds of a bank, in cash, notes, bills, etc., to be used from time to time for the purposes of the bank. He receives directly or through the subordinate officers, all moneys and notes. He draws checks, from time to

> time, for moneys wherever the bank has deposits. In short, he is the executive officer through whom and by whom the whole moneyed operations of the bank, in paying or receiving debts or discharging or *transferring securities*, are to be conducted: *Fleckner v. U. S. Bank*, 8 Wheat. 360, 361; 12 Serg. & R. 265. *It is, perhaps, more difficult to define with precision the powers of the president of a bank; but I believe it may be said with safety that they are not so important as those of the cashier.*"

In *Hoyt v. Thompson*, 5 N. Y. 320, a demurrer to the bill of complaint was overruled at special term, and the question was as to the correctness of this ruling. The bill alleged (among other things) that certain mortgages were assigned to the State of Michigan, as collateral security, by the president and cashier of the Morris Canal and Banking Company, but that this was done without authority from the board of directors of said company. The court thus states the question:

> "Upon the bill and demurrer in the present case, all idea of implied authority is effectually excluded. The bill alleges that the president and cashier had no authority from the directors to execute the assignments, and the demurrer admits it, and unless the charter of the corporation gave authority to the president and cashier to make the assignments, without the knowledge and assent of the directors, they were made without authority."

The charter was then considered by the court, and the conclusion was announced that

> "the power and duties of the president and cashier are not prescribed by the charter; no

> power is conferred upon them to mortgage, assign or dispose of the property of the corporation."

The question involved, therefore, related merely to the proper interpretation of the charter of the bank.

The case of *Holt v. Bacon,* 25 Miss. 567, was a suit upon a judgment recovered by the Planters' Bank against defendant. The bill alleged that the judgment was transferred to plaintiff "by the president, directors and company of the bank". The evidence that the cashier of a branch of the bank in question made out a list of certain judgments among which was the one in controversy and handed it to an agent of the complainants.

The court states the question as follows:

> "The question here arises, whether this proof sustains the allegation of the bill that the judgment was transferred by the president, directors and company of the bank."

The case can hardly be considered as an authority supporting respondents' contention.

The memorandum decision in *Lionberger v. Mayer,* 12 Mo. App. 575, does not appear to have any bearing upon the case.

The only point involved in *Winsor v. Lafayette County Bank,* 18 Mo. App. 665, was whether the cashier could bind the bank to pay the plaintiffs (real estate brokers) a commission upon the sale of land. The quotation in the brief for plaintiffs in error (p. 18), is unintentionally misleading.

The power drawn into question in that case was not the power to *sell,* as the quotation would imply, but the power to employ brokers for that purpose.

The case was special in its circumstances, besides, the court saying (p. 672):

> "The duty of the cashier of defendant as stated in the by-laws are somewhat more circumscribed than those commonly supposed to devolve upon that officer and as his duty is defined to be by the Supreme Court of the United States in the case of *United States v. City Bank of Columbus* (21 Howard 360)."

The by-law there involved is set forth on page 667 of the report, and will be seen to be very much narrower in its scope than the one here involved.

How different the case of *Burris v. Bank of Buffalo,* 70 Mo. App. 675, cited on page 25 of respondents' brief, is from the one at bar may be seen from the following statement of facts involved. One Morrow, the cashier of a bank, undertook to act for the plaintiff, who was negotiating a purchase of certain real estate of which Anna McGregor was the record owner. The plaintiff, being about to leave the state, gave directions to Morrow to pay the purchase price upon the owner's delivering a proper warranty deed conveying the premises to the plaintiff. Morrow accepted what purported to be a deed from Anna McGregor. In so doing, as the court determined, he was acting as agent for the plaintiff. The deed turned out later to be a forgery and in a suit against the bank it was held that it could not be held responsible for the act of Morrow.

In the course of the opinion it is said (p. 680):

> "He (Morrow) could not and did not act for the bank any further than to receive the money for deposit and issue a certificate. *His further agreements with plaintiff were of a character to necessarily make him an agent of plaintiff in carrying out such agreement.* * * * The mere fact that such agent was, for other purposes, likewise defendant's agent is of no consequence."

In *Asher v. Sutton* (Kan.) 4 Pac. 535, the president and cashier of the Exchange Bank, *several months after the latter had become insolvent,* executed to the plaintiff a bill of sale of a safe belonging to the bank. Afterwards the defendant sheriff levied on the safe by virtue of a writ of execution issued upon a judgment against the bank. Apparently there was no change of possession of the safe after the execution of the bill of sale. Under the by-laws of the bank, it may be observed in passing, the cashier was not an officer thereof, but a mere appointee of the board of directors. The court held that the judgment which was in favor of the plaintiff, should be reversed. It is hardly necessary to say that in the case at bar the sale occurred while the bank was fully solvent and long before the receiver took charge.

The case of *Greenawalt v. Wilson* (Kan.), 34 Pac. 403, is a case similar to the last, and the point to which it is cited by respondents' counsel was decided almost without comment upon the authority of said case. The bank became insolvent and on October 18, 1888, a receiver was appointed therefor. Later an

order discharging the receiver was entered. Before the latter was reversed the receiver returned the horse to a livery stable subject to the order of the president of the bank. On December 8, 1888, the president and cashier attempted to sell the horse. The sale was held invalid.

In *Spongberg v. First etc. Bank* (Idaho), 110 Pac. 716, the trial court found in favor of the defendant bank, and the judgment was reversed by the Supreme Court of Idaho. The case concerned a five-years lease entered into on behalf of the bank by its cashier. While the court stated that it "usually is the ordinary practice for the cashiers of the general average of banks" to enter into leases, it concluded that the same was "outside of the ordinary business and duties of the cashier, unless he is specially authorized so to do". Without attempting to reconcile these statements, it is sufficient to say that the language relied upon was not necessary to the decision, the holding of the court being that the bank was bound by the lease by reason of its failure to disaffirm the same.

The quotation in respondents' brief from the opinion of the Supreme Court of Mississippi in the case of *Gloster v. Hindman,* 50 So. 65, is unintentionally inaccurate.

All of the facts in the case showed that the action of the cashier was for his own individual interest, and it was that circumstance that made the court declare the transaction outside the usual course of business. To restate the somewhat complicated array of facts would not be profitable. The prin-

ciple declared by the court may be seen from the following quotation from the opinion:

> "It is indisputably shown that all payments made to the Bank of Gloster and the transfer of collaterals and the mortgages of property belonging to the Central Bank was the enterprise of Rice on his own account, and was unknown to the directors and not acquiesced in by them in any way or ratified either actually or constructively. * * * Giving mortgages on the bank's property, and transferring its assets, and destroying the bank itself, were not acts done by Rice within the usual scope of his authority or in the usual course of business; and this applies not only to the execution of the mortgages without the consent of the directors, but also applies to the $500 paid to the Bank of Gloster at the time, and to such collaterals as were turned over to the State Bank & Trust Company for the benefit of the Bank of Gloster."

It is, therefore, respectfully submitted that the authorities cited by plaintiffs in error do not sustain their contention that the cashier of a bank, in the absence of special circumstances, is without authority to make a sale of property of the kind in question belonging to the bank.

Passing, now, from this subject, the evidence bearing upon the implied ratification of the sale will be considered.

2. CONCEDING SOLELY FOR THE PURPOSES OF THE ARGUMENT THAT PALMER EXCEEDED HIS AUTHORITY IN MAKING THE SALE, THE EVIDENCE ESTABLISHES AN IMPLIED RATIFICATION THEREOF.

It is elementary law that a contract made by an officer or other agent of a corporation without

authority may be ratified either by the silence of the directors after obtaining knowledge thereof, or by their failure to promptly return the benefits received by the corporation under the contract. As we have shown, the trial court found that Palmer "possessed full power to make such sale on behalf of said defendant bank, and said sale was a valid act of said defendant bank, and was and is binding upon it" (Tr. fol. 54), and, also, that plaintiff "was on the 3rd day of January, A. D. 1907, and ever since has been, and now is, the owner of said 593 shares of the capital stock of said Burnham-Standeford Company, etc." (Tr. fol. 57). Under the California practice, it is not necessary that any replication be filed by the plaintiff, but "any new matter in the answer, in avoidance or constituting a defense or counterclaim must on the trial be deemed controverted by the opposite party" (Code of Civil Procedure of California, sec. 462). The evidence upon the question of the ratification by the directors was, therefore, relevant upon the issue offered by the answer and supports the finding as to the binding effect of the sale made by Palmer.

Goetz v. Goldbaum (Cal.), 37 Pac. 646.

We respectfully submit that—though there is no express finding upon the point—the evidence shows, and it must be presumed (if necessary), in support of the judgment that the court determined that the fact that the bank failed to take any action looking toward a rescission or repudiation of the

sale for almost three weeks after it was made, during which period two directors' meetings and one stockholders' meeting were held, established a ratification. In *2 Ency. Law & Procedure,* p. 868, it is said that "the conduct of the principal will be liberally construed in favor of a ratification or adoption of the act of the agent * * *."

The record shows that late in the afternoon of January 2nd, Palmer telephoned McBoyle that Brown had said to "let the stock go", and that it was sold for the sum agreed upon between them, $11,000 (Tr. fol. 76). On the following morning McBoyle paid Schammel $1500, received the stock and re-delivered it to secure the balance of the purchase price (Tr. fols. 69-70). The transaction was then entered in the journal of the bank as follows:

"Bond investment 599 shares of Burnham-Standeford sold at $11,000. Credit interest account $500. A total of $10,500" (Tr. fols. 203-204). On January 4th, the day following the sale, Palmer, whose authority is here attacked, was elected president of the bank, which office he had been offered by Brown on New Year's day (Tr. fol. 116).

(Upon the bearing of the fact of Palmer's elevation to the presidency as evidence of a ratification of the sale theretofore made by him, see *Bass v. Chicago etc. Co.,* 42 Wis. 437; 24 Am. R. 437; *Dickinson v. Zubiate Mining Co.,* 11 Cal. App. 656; 106 Pac. 123; *West v. Prather Co.,* 7 Cal. App. 81; 93 Pac. 892.)

From what has been said it is evident that no question can be made respecting the directors' knowledge of the transaction. The president, Palmer, knew all about the sale, for he had made it a day or so before his election to that office. Brown knew all about it, for he was consulted by Palmer on January 2nd with regard to it. So did Mr. W. W. Crane, who was elected cashier and secretary on the 4th of January to succeed Palmer (Tr. fol. 90); for he, Crane, was present at the time of, or immediately after, the sale (Tr. fol. 75); and so also did Mr. de Fremery, another of the directors, for he too was present at that time or immediately after (Tr. fol. 75) and was elected a director on January 4th (Tr. fol. 91); and all the other directors are conclusively presumed to have known of it at least as early as the third, because the transaction was then duly entered upon the books of the corporation (Tr. fol. 87).

Phillips v. Sanger Lumber Co., 130 Cal. 431, 434;

Curtin v. Salmon River etc. Co., 141 Cal. 308;

Mills v. Boyle Mng. Co., 132 Cal. 95, 98.

That a ratification will be implied from proof of the individual knowledge of directors not acquired at a directors' meeting, see the following:

Brown v. Crown etc. Co., 150 Cal. 376;

Scott v. Superior etc. Oil Co., 144 Cal. 140.

Having that knowledge, the directors and stockholders delayed until January 19th before taking any action looking toward an avoidance of the

transaction. On that day they adopted the resolution which has been referred to, which purported to set aside a sale made to McBoyle (Tr. fols. 95-97), and two days later a copy of this notice was served upon him (Tr. fols. 94-98).

During the interval between January 2nd or 3rd and January 21st the directors and stockholders, though they held three meetings, did nothing toward informing McBoyle of their election not to abide by the action of the cashier. During this period of almost three weeks they chose to remain quiescent and to await the rise or fall in value of the stock and to ascertain as best they could whether their own advantage would be best served by affirming or attempting to disaffirm the transaction. We respectfully submit that under the authorities their election exercised on the 21st came too late, even had it been proper in substance, and even had notice thereof been given the purchaser.

It may be added that under the National Bank Act (R. S. U. S., sec. 5136) the *directors,* and not the stockholders, prescribe the bank's by-laws and define the duties of its cashier and other officers. There is therefore double reason in the present case for implying from the directors' knowledge of the transaction a ratification of Palmer's act and a waiver of the by-law defining his powers, conceding for the purposes of the argument that such by-law was insufficient to confer the necessary authority. If the directors originally enacted said

by-law, certainly no one will doubt their power to amend or waive it.

Foster v. Rockwell, 104 Mass. 167, was an action to recover the price of certain nitrate of soda claimed by plaintiff to have been purchased by defendant, through his agents. Said agents had from time to time purchased nitrate of soda for defendant in the city of Boston. Prior to making the purchase in question, they had received a letter from defendant requesting them to purchase 25 bags of nitrate of soda. Being unable to obtain the necessary quantity of nitrate of soda in Boston, they purchased the same in New York and directed that it should be shipped to them by water. The vessel upon which the shipment was made was sunk in a collision in Long Island Sound and the nitrate of soda was lost. The defendant claimed that the agents had exceeded their authority in purchasing in New York, and refused to pay for the lost goods. On October 21st, the agents mailed defendant a letter informing him of the purchase and shipment. On October 29th, the latter addressed a letter to the agents disapproving their action in not making the purchase in Boston.

In holding that an implied ratification had been established, the Supreme Court of Massachusetts said, per Colt, J.:

> "On the 21st day of October, a letter was mailed by these agents to the defendant, giving him definite information of the purchase and shipment, with all the particulars of the transaction. No reply was made to this letter; and

the first expression of disapprobation on his part is contained in a letter to the agents dated the 29th of October in reply to one of the 26th, containing a suggestion that the property had been lost in Long Island Sound. We think there is sufficient evidence, in this conduct of the defendant, that he intended the original authority to cover the act, or that he then ratified and affirmed it.

"*The duty of the principal at once to disaffirm an act done by another in his name, or on his account, when brought to his knowledge, is more imperative when the unauthorized act is the act of an agent, done in the execution of a power conferred, in a mode not sanctioned by its terms. Implied ratification from mere silence more readily arises when the act is in misuse or excess of authority given. In such cases, the principal has no right to delay, if he intends in any contingency to repudiate the conduct of his agent. He cannot lie by, and seize the benefit of it if profitable, or renounce it if otherwise, at his election. The defendant's silence on the receipt of the letter in this case cannot be accounted for on any other theory than that of his approval of the purchase.* It is of no consequence that the letter did not give the information requisite to enable him to obtain insurance, or that it was not probably received until after the loss. The question is not affected by the fact that by the loss the plaintiff's relation to the goods was changed, and their power to repossess them gone, before the defendant could have had time to disaffirm. If the transaction, when brought to his knowledge, was not seasonably disapproved, it is enough and a ratification must be presumed, with all the consequences which follow, one of which is that the property vested in him, before its loss, by delivery to the carrier."

In *Kelsey v. National Bank,* 69 Pa. St. 426, the cashier of a national bank, without authorization from the directors, offered a reward of $5000 for the detection of thieves who had broken into and robbed said bank. In holding that such action had been impliedly ratified by the bank, the Supreme Court of Pennsylvania said, per Williams, J.:

> *"If * * * the directors of the bank were informed that the cashier had offered the reward, it was their duty to promptly disavow the act, if they did not intend that the bank should be bound by it. If they had notice of the offer and did not dissent from it, their assent and ratification must be presumed. Nor is it necessary, in order to bind the bank by their acquiescence, that notice should have been given the directors when sitting in their official capacity as a board. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it."*

In *Indianapolis Rolling Mill v. Railroad Co.,* 120 U. S. 256, 30 L. Ed. 639, the Supreme Court of the United States said:

> *"The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that, if they had the right to disaffirm it, they should do so promptly, and if, after a reasonable time, they did not so disaffirm it, a ratification would be presumed."*

In *Ward v. Williams,* 26 Ill. 447, 79 Am. D. 385, a distinction is taken between cases in which the act claimed to have been ratified was the act of a stranger and cases like the one at bar, where it is

claimed merely that an agent has transcended his authority. Said Mr. Chief Justice Cator, delivering the opinion of the Supreme Court of Illinois in the case cited:

> "In general, where an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act *as soon as he is fully informed* of what has been thus done in his name, by his agent, else he will be bound by the act as having ratified it by implication; but where a stranger, in the name of another, does an unauthorized act, the latter need take no notice of it, although informed of the act thus done in his name, and he shall only be bound by affirmative ratification."

In *Harrold v. McDaniels,* 126 Mass. 413, 415, the Supreme Court of Massachusetts used the following language:

> "It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to *disaffirm at once,* on knowledge of the act, is said to be more imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them."

In the case of *Standard Leather Co. v. Allemania Fire Ins. Co.* (Pa.), 73 Atl. 192, the rule is stated in the following language:

> "One who knows that his agent has undertaken to do for him what he is not authorized to do, is bound to repudiate the act promptly. * * *"

Fischer v. Motor Boat Club, 113 N. Y. Supp. 56, was an action for rent based upon a lease executed by the secretary of the defendant corporation. The statute under which defendant was incorporated provided that no lease should be made by corporations of its class "unless ordered by the concurring vote of at least two-thirds of the whole number of the directors". Notwithstanding the directors had not voted the necessary authority, the secretary executed the lease sued upon. It was shown that the directors held three meetings after this had been done (one of them upon the leased premises), but had failed to take any action at any of such meetings repudiating the lease.

In holding that the evidence established an implied ratification of the act of the secretary, the Supreme Court said:

> "Where a party does work or furnishes material to a corporation, to the knowledge of its officers, without prompt dissent on the part of the corporation, it will be held to have ratified the contract and be liable thereunder. Cunningham v. Massena Springs etc., 63 Hun., 439, 18 N. Y. Supp., 600; Lee v. Pittsburg Coal & Mining Co., 56 How. Prac., 373. The fact that defendant held at least one meeting at the leased premises, and transacted business of the defendant at their meeting, was evidence tending to show that they took possession, and that

there was a ratification (White v. Sheppard, 41 App. Div. 113, 58 N. Y. Supp. 563; Kent v. Mining Co., 78 N. Y. 159), making the act of the secretary equivalent to an original authority on the part of such secretary. The testimony tends to show that the acts of the secretary were with the knowledge and assent of the board of governors and tends to establish a ratification."

III.

The Stock Having Been Pledged by McBoyle With the Bank, the Bank Is Estopped to Deny His Title Thereto.

The conceded facts in this regard appear in the testimony of George McBoyle, the only witness who testified upon this point, and in the findings made by the trial court (Tr. fols. 54, 55). Pursuant to the agreement between McBoyle and Palmer relative to the sale of the stock, the former called at the bank on the morning of January 3, 1907, paid Schammel, the assistant cashier and note teller, $1500 and asked for the stock (Tr. fol. 69). The latter thereupon handed McBoyle the certificate and went on making out the note (Tr. fol. 69). This occupied some five or ten minutes (Tr. fol. 71), and during this time and until after the note and contract annexed thereto had been executed, McBoyle retained possession of the certificate (Tr. fols. 69, 69, 65). After signing his name at the places indicated by Schammel, McBoyle passed both the note and certificate back to the latter and left the bank (Tr. fol. 69).

The findings of the trial court were in accordance with this evidence (Tr. fols. 54, 55).

"Every contract", the statute declares (Civil Code of California, sec. 2987), "by which the possession of personal property is transferred only, is to be deemed a pledge". Can it be questioned that McBoyle's possession of the certificate was sufficient upon which to predicate a pledge thereof? If it be held that it was not, it is clear that a rule will have been established whereby the great majority of contracts under which personalty is held to secure obligations may be readily overturned.

Nor (as we shall presently point out), is it at all material for the purpose of determining whether there was a valid pledge in the present case, to consider the question of Palmer's power to make the sale. We do not think any authority can be found to sustain the proposition that the validity of a contract of pledge depends upon the validity of the pledgor's title, or upon the rightfulness of his possession. Indeed, a fundamental and almost elementary rule of the law of bailments declares that even a thief may make a valid pledge, and forbids the pledgee in such case from attacking the pledgor's title.

In *3 Am. & Eng. Ency. Law,* pages 758 and 759, the rule is thus stated:

> "The rule is well settled that a bailee cannot set up his bailor's want of title as a justification of his refusal to deliver. By the acceptance of the bailment the bailee impliedly admits the title of his bailor, and he is estopped thereafter

> from setting up title in himself. *So far does this principle obtain, that although the title to the goods be in the bailee and even though he may have received them in ignorance of his own right, having accepted the possession of them in the capacity of bailee, he is estopped from claiming them by title until he has fulfilled the obligations of the trust by returning them to his bailor.*"

In *Stonard v. Dunkin,* 2 Camp. 344, where the defendants, to whom the plaintiff had delivered certain malt, attempted to defend a suit to recover the same upon the ground that the malt did not belong to the plaintiff, Lord Ellenborough said:

> "It is clear that the defendants cannot say to the plaintiff, 'The malt is not yours', after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely upset the security of mercantile dealings were I now to suffer them to contest his title."

Simpson v. Wren, 50 Ill. 222, 99 Am. D. 511, was an action of replevin to recover possession of a gun which the plaintiff had lent to the defendant, and which the latter refused to return, upon the ground that it was his own. It appeared from the evidence that the plaintiff, who was a lieutenant in the Union army, when encamped near Baton Rouge, Louisiana, was ordered with a portion of his men to attack a squad of the enemy, and that in so doing, a lot of arms, including the gun in controversy, were taken. The provost marshal turned this gun over to plaintiff. The defendant afterwards borrowed the gun from plaintiff, and when its return was

demanded, refused to return it, on the ground that he had purchased the gun from another member of the company before it was taken to the provost marshal. The plaintiff asked the trial court to instruct the jury that the defendant, under the circumstances, could not set up title in himself. This request was refused, and the verdict went for the defendant.

In reversing the judgment, the Supreme Court of Illinois said, per Walker, J.:

> "It is urged that a bailee cannot set up property in himself to defeat a recovery in replevin by his bailor. The proposition is undeniably true that a bailee of property may recover it of his bailor if he can show that he is lawfully entitled to the possession and use under a valid agreement, although the latter may be the owner. The action of replevin may be maintained by the owner against any person wrongfully in possession, as in such case the right of property carries with it the right of possession. But, on the contrary, a person having a special property in the chattel in controversy, entitling him to the possession, may recover it in this form of action against anyone, even the owner."
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> * * *
>
> *"A person claiming to own property should not be permitted to get possession by such a fraud, and then refuse to restore it because he claims to own it. This, in many cases, would give him an undue advantage, as it would impose the burden of proving ownership on the lender, by a preponderance of evidence, while, had it remained in his possession, the burden would have been on the opposite party. We are therefore of the opinion that if appellee borrowed the gun, he should not be permitted to set up title in himself until he has restored it to appellant."*

First National Bank v. Mason, 95 Pa. St. 113, 40 Am. R. 632, was an action against a bank to recover money deposited with it by plaintiff. The bank offered to prove that the plaintiff in making the deposit had acted as the agent of the firm of Thomas & Mason, to whom the money belonged, and that it (the bank) had a claim against said firm, which offset the indebtedness sued upon. The evidence was rejected by the trial court and the defendant appealed to the Supreme Court of Pennsylvania. In affirming the judgment that court after alluding to a number of authorities which declare the rule that a bailee may refuse to return the property to the bailor when a third party has made claim therefor, said:

> "These were cases however in which the true owner set up a claim to the fund. *We have here a very different question. The bank, the depositary, sets up an adverse title to defeat the suit of its own depositor.* * * *
>
> *"Having received it as the money of the plaintiff and given him credit therefor, the bank is estopped, in the absence of any notice from or claim by the real owner, from disputing the plaintiff's title. Having received the money as the money of the plaintiff, it is bound to pay it to him or upon his order. Such a contract is implied from the fact of the deposit."*

In *Pulliam v. Burlingame*, 81 Mo. 111, 51 Am. R. 229, the defendant borrowed two mules from the plaintiff, and when their return was demanded, refused the demand, upon the ground that he was holding the mules for his wife who jointly with plaintiff owned an undivided one-half interest in

the mules. The trial court charged the jury that if they should believe that the defendant had borrowed the mules, as above stated, and had refused to return them upon demand, they should find in favor of the plaintiff. An instruction requested by defendant upon the point that if they should find that the defendant held the mules as agent for his wife they should find for the defendant was refused.

In affirming the judgment, the Supreme Court of Missouri said:

> "In borrowing the mules he became a bailee of them like any other borrower. There being no time fixed for a termination of the bailment, that time could be indicated at any moment by the bailor. It was determinable at his option and when so terminated it was the duty of the bailee to return the property bailed to the bailor. The contract of bailment necessarily admits the right of property in the bailor, and the obligation to return it to him at the termination of the term of bailment. In other words, a bailee, when he receives the property by virtue of the bailment, legally admits the right of the bailor to make the contract of bailment. After this subservient relation of the defendant to the plaintiff in respect to the property was established, the law forbids him to dispute the title of plaintiff. The relation is analogous to that which exists between landlord and tenant, a relation which prevents the tenant from setting up against his landlord, either an outstanding or self-acquired adverse title; and from attorning to a stranger without the consent of his landlord, or in pursuance of a judgment or sale under execution or deed of trust, or forfeiture under mortgage."

After referring to a number of the authorities, the court continued:

> "The relation of bailor and bailee is not antagonistic in any respect, or at any time. By accepting the property he not only admits the bailor's title, but he assumes, with respect to the thing bailed, a position of trust and confidence, which continues till it is returned or lawfully accounted for. Measured by these principles, the defendant's evidence must fail to excuse him from the obligation to return the borrowed property found in his possession at the time of the replevin. It does not appear that his wife, as paramount claimant, ever asserted any title to this property. Consequently his plea that he holds it as agent for his wife, implies that this is his voluntary act, and was not forced upon him by the assertion in any form of her pretended title. It will not do for a bailee to hunt up a paramount claimant, and then when called upon by the bailor for the property answer that he is now the voluntary bailee of such claimant. It must be apparent that this would enable him to enjoy the property by pretending to hold it for another."

See, also, the following:

Bates v. Capital State Bank (Idaho), 110 Pac. 277;

Stephens v. Vaughan, 4 J. J. Marshall 206, 20 Am. D. 216;

Atlantic Ry. Co. v. Spires (Ga.), 57 S. E. 973;

Barkey v. Lewis Storage Co. (Conn.), 65 Atl. 143;

Pepper v. James (Ga.), 67 S. E. 218, 220;

Hampton v. Swisher, 4 N. J. L. 66;
Thompson v. Williams (Kan.), 1 Pac. 47;
Osgood v. Nichols (Mass.), 5 Gray 420;
Bigelow on Estoppel, p. 548;
Van Zeil on Bailments & Carriers, p. 17.

Though the citation of authorities which declare the rule relied upon by us in this connection might be greatly extended, it is thought that the foregoing will suffice to establish the proposition that a valid pledge was made in the case at bar, and that plaintiffs in error cannot defend this action upon the ground that the title to the stock never passed from the bank to McBoyle. Irrespective of whether the title did so pass, it cannot be successfully claimed that McBoyle did not have possession of the certificate. Had he retained such possession, plaintiffs in error would of necessity have been the plaintiffs in this litigation, with the burden of proof resting upon them. The law declares that one who voluntarily surrenders his possession to another, who takes the same upon promise to restore possession to the bailor upon performance of any condition or conditions, shall stand in no worse position by reason of the trust thus reposed by him. It will not permit the bailee in any controversy with his bailor respecting the subject of the bailment to avail himself of the strategic advantages which always accompany possession—"the nine points of the law"—

but requires of the bailee, as a condition of his asserting ownership to the property, that he shall first surrender possession.

Without entering upon any discussion of the reason and justice of this well-settled rule, which merely denies that the bailee shall profit by a breach of trust on his part, and which so eminent an authority as Lord Ellenborough declared was essential to "the security of mercantile dealings", we submit that its application in the present case must lead to the reversal of the order appealed from. Defendants in error undeniably had actual possession of the certificate and surrendered it to the bank, which received it as security for the note. All this was found by the court (Tr. fols. 54, 55), and is beyond dispute, for it appears not only from the testimony of the witnesses, but from the terms of the note itself.

We respectfully submit, therefore, that for this reason,—even if there were no other in the case,—the judgment should be affirmed.

For the reasons stated, it is respectfully submitted, that the writ of error must be dismissed for

want of jurisdiction, or (if not dismissed), that the judgment should be affirmed.

Dated, San Francisco,
November 29, 1916.

Respectfully submitted,
JULIUS KAHN,
T. C. COOGAN,
H. A. POWELL,
W. H. ORRICK,
Attorneys for Defendants in Error.

INDEX.

Pages

Statement of the Case 1-2

Specifications of Error Relied Upon 3-4

Brief of the Argument 4-30

1. The cashier of the bank is the executive officer of the bank, and his duties are confined to the ordinary business of the bank, all other transactions being exclusively in the province of the board of directors 6-8

   Magee on Banks and Banking 6

   Morse on Banks and Banking 7

2. The sale of the stock in question was not part of the ordinary business of the bank, but was a matter requiring the exercise of judgment by the board of directors 8-11

3. The cashier of a bank has no authority under the authorities to sell property belonging to the bank, the control of such matters, calling as they do for the exercise of judgment and discretion being exclusively vested in the board of directors 12-22

   Asher v. Sutton, 31 Kan. 286 ..... 13, 19

   Bank of Commerce v. Hart, 37 Neb. 197 ..... 12, 16

   Bank of Gloster v. Hindman, 94 Miss 742 ..... 13, 21

   Burris v. Bk. of Buffalo, 70 Mo.App. 675 ..... 13, 19

   5 Cyc 475 ..... 12, 15

   Greenwalt v. Wilson, 52 Kan. 109 ..... 13, 19, 20

   Holt v. Bacon, 25 Miss. 567 ..... 13, 17

Hoyt v. Thompson, 1 Selden 320.....13, 17

Leggett v. New Jersey Bk. Co., 1 N.J.Eq. 451 .....12, 17

Lionberger v. Mayer, 12 Mo. App. 575.....13, 18

Magee on Banks and Banking 12, 14

Martin v. Webb, 110 U.S. 14 .....12, 16

Morse on Banks and Banking 12, 13

Sponberg v. First Nat. Bk., 18 Idaho 524..... .....12, 13, 20

United States v. City Bank, 21 How. 356....12, 15, 21

Windsor v. Lafayette Bk., 18 Mo.App. 675.....13, 18

4. There is nothing in this case to take it outside of the general rule as to the sale of property belonging to the bank 22, 30

Burris v. Bank of Buffalo, 70 Mo.App. 675.....27

Greenwalt v. Wilson, 52 Kan. 109.....28

Leggett v. New Jersey Bk. Co., 1 N.J.Eq. 451.....27

Morse on Banks and Banking 24

Sponberg v. First Nat. Bk., 18 Idaho 524.....27

Windsor v. Lafayette Bk., 18 Mo.App. 675.....27

(24,792)

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 511.

UNION NATIONAL BANK AND CLAUD GATCH, SUBSTITUTED FOR H.N. MORRIS, AS RECEIVER OF SAID UNION NATIONAL BANK, PLAINTIFFS IN ERROR,

vs.

GEORGE McBOYLE AND LULU MAY McBOYLE, DEFENDANTS IN ERROR.

Brief on Behalf of Plaintiffs in Error

STATEMENT OF THE CASE.

This case comes before this Court upon a writ of error issued to the Supreme Court of the State of California.

The question involved deals with the power of the cashier of a national bank, and with the power of the board of directors, in reference to the sale of

property, in this case stock in another corporation, belonging to the bank and carried by it as an investment.

The action was brought in the state court by the defendants in error to recover certificate number 59 for 599 shares of the capital stock of the Burnham Standeford Company, defendants in error claiming title by virtue of a purported sale of the stock by the cashier of the bank made without authority from the board of directors, which board promptly repudiated the purported sale upon learning thereof.

The plaintiffs in error in their amended answer raised the question that the cashier had no power or authority to sell this stock under the terms of the "National Bank Act" (Tr. p. 19), it being their contention that the control of such business is vested by that act exclusively in the board of directors.

The judgment of the state supreme court, the highest court of the state, denied the exclusive power of the board of directors and affirmed the power of the cashier to sell the stock in question.

Since the commencement of the action the bank has become insolvent, and this proceeding is now being prosecuted by the receiver on behalf of the bank under the direction of the Comptroller of the Currency.

SPECIFICATION OF THE ERRORS RELIED UPON.

The assignments of error, as set forth in the transcript (pages 62-63), are as follows:

First. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the Cashier of the said defendant Union National Bank, a National Banking Association organized under the provisions of the "National Bank Act," had authority under the provisions of said act, and without the consent or authorization of the board of directors of said bank, to sell corporate stock owned and held by said bank and carried by it as an investment on its books in its bond and investment account.

Second. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the board of directors of said defendant Union National Bank, had not the authority under the provisions of said "National Bank Act" to sell or direct the sale of corporate stock owned and held by said bank and carried by said bank on its books as an investment in its bond and investment account.

Third. The Supreme Court of the State of California erred in its opinion in said cause and in the judgment rendered therein in holding and deciding that the board of directors of said defendant Union

National Bank, had not the authority under the provisions of said "National Bank Act" to repudiate the sale attempted to be made by the Cashier of said bank of corporate stock owned and held by said bank and carried by said bank on its books as an investment in its bond and investment account.

These assignments are so closely related that in this brief they will be treated as one, the error asserted and urged being that the state court erred in holding that the cashier had the authority to sell property belonging to a national bank and that the board of directors had no power to sell and no power to repudiate the sale attempted to be made by the cashier.

BRIEF OF THE ARGUMENT.

The one point that we desire to present for the consideration of the Court is the point that the board of directors of a bank organized under the National Bank Act is the body and the only body in which is vested the right to sell property *belonging* to the bank. Stating the same point in another way, it is this, the board of directors had the right to repudiate the sale attempted to be made by the cashier to the defendants in error of the certificate of stock in question, or, stating the point still another way, it is this, that the cashier of a national bank has no inherent authority to sell property belonging to the bank.

In support of this general proposition, we shall present herein the following points:

1. The cashier of the bank is the *executive* officer of the bank, and his duties are confined to the *ordinary* business of the bank, all other transactions of the bank being exclusively in the province of the board of directors;

2. The sale of the stock in question was not part of the *ordinary* business of the bank, but was a matter requiring the exercise of judgment by the board of directors;

3. The cashier of a bank has no authority under the authorities to sell property *belonging* to the bank, the control of such matters, calling as they do for the exercise of judgment and discretion, being vested exclusively in the board of directors;

4. There is nothing in the case to take it outside of the general rule as to the sale of property belonging to the bank.

We shall present these points in the order named.

1. THE CASHIER OF THE BANK IS THE EXECUTIVE OFFICER OF THE BANK, AND HIS DUTIES ARE CONFINED TO THE ORDINARY BUSINESS OF THE BANK, ALL OTHER TRANSACTIONS OF THE BANK BEING EXCLUSIVELY IN THE PROVINCE OF THE BOARD OF DIRECTORS.

We desire at the outset to concede that a bank cashier has inherent power to bind the bank in all matters within his sphere; furthermore, we desire to concede that his sphere is a large one and that, within that sphere, his acts are binding upon the bank without any express authorization from, and without any ratification by, the board of directors.

We do not question the power of a bank cashier to loan and borrow money, to transfer negotiable paper, or extend the time for paying a note, to accept and sell notes and drafts, to take security for loans, to release a debt and mortgage, and in general to transact the usual and ordinary business of the bank. We realize that he may do all of these things.

Furthermore we realize that there are cases that recognize the power of a cashier to do certain acts outside of the ordinary business of the bank where that power is expressly conferred by the by-laws, or by vote of the Board of Directors, or by long acquiescence; but no such special circumstances are present in this case.

The nature of the duties and powers of a bank cashier is well stated in *Magee* on *Banks and Banking,* Section 127, page 139, as follows:

> "The office of the cashier is strictly executive. In the absence of expressed authority from the board of directors he can only perform the *daily routine* business of the bank. To state his position correctly he is the *executive* agent of the board of directors. The leading authorities hold that beyond the ordinary business of the bank his acts must be authorized and directed by the board of directors."

In *Morse* on *Banks and Banking* the author defines the duties of the bank cashier as being "strictly executive," and as confined to the "daily routine of business," and distinguishes his authority from that "domain of discretionary authority which pertains exclusively, and for the most part inalienably, to the directors." The author says in section 152, page 333 (4th edition):—

> "The key-note to the whole subject lies in this: that the office of the cashier is *strictly executive.* He is the business officer of the bank, but in the sense of one who *transacts* the business, not of one who regulates and controls it. The grand difficulty which has been experienced in defining his exact functions has always lain in the necessity of giving him sufficient practical power to enable him to conduct the *daily routine of business* without trespassing upon the *domain of discretionary authority which pertains exclusively, and for the most part inalienably to the directors.* Acts which demand only confidence in the integrity of the official, and familiarity with the forms and customs of business, acts strictly of performance, which do not rise to the importance of the semi-judicial character, are those which he is properly delegated

to do. But the responsible conduct and management of the affairs of the institution, upon the soundness and wisdom of which its prosperity and success depend, which call for the exercise of a high degree of care, knowledge and experience, and a semi-judicial discretion, which demand general business qualifications of a high order, are not, and never have been held to be, appurtenant to the office of cashier. He is properly the executive agent of the directors. It is his duty to carry out what they devise. They are responsible for the soundness of the action resolved upon; he is responsible for the honesty, accuracy, regularity and skill with which that action is carried out. They are the mind and he is the hands of the corporation. They may decide to make a certain loan or discount, *to sell* or mortgage *corporate property.* He will pay over the money, take the borrower's note and see that it is in proper form; he may, by direction of the board, affix the corporate signature and seal, and make delivery, on behalf of the corporation, of all instruments necessary to complete the conveyance or the mortgage. It is not wholly unapt to liken the board of directors to a bench of judges, and the cashier to the clerk of court." (The italics are ours.)

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2. THE SALE OF THE STOCK IN QUESTION WAS NOT PART OF THE ORDINARY BUSINESS OF THE BANK, BUT WAS A MATTER REQUIRING THE EXERCISE OF JUDGMENT BY THE BOARD OF DIRECTORS.

Nowhere in the National Bank Act is a national bank given either express or implied power either to buy or sell stock in another corporation. Ob-

viously, therefore, the sale of corporate stock is not part of the ordinary or routine business of a national bank.

The certificate of stock involved in this case was originally pledged to the bank to secure a loan. The pledgor became insolvent, and the bank purchased the legal title to the stock from a purchaser at a sale of the bankrupt's assets, and thereafter carried the stock upon its books in its bond and investment account. The legal title to the stock was acquired three years prior to the purported sale by the cashier to the defendants in error, and the certificate had been pledged to the bank at least ten years earlier than that. (Tr. pages 21, 36.)

The stock in question admittedly had no market value; furthermore, no one knew its value. (Tr. pages 23, 33). The defendant in error, who attempted to purchase the stock, was the president of the company issuing the stock; and he testified that "it was a matter of conjecture what it was worth" (Tr. page 33). Again he said: "No one can tell as to the value of the stock" (Tr. page 34).

The price at which defendant in error agreed to purchase the stock was $11,000, $1500 cash and his note for $9,500 (Tr. pages 23, 24). That was the amount due the bank upon the stock at the time it acquired legal title three years before, plus $500 for interest (Tr. page 32). The cashier had no knowledge as to the value of the stock (Tr. page 48), and

of course he could hardly be expected to know its value when the president of the company himself did not know.

We believe that even though this stock had a market value, with which the cashier was familiar, and even though it were sold for its full market value, still the sale of it would not be part of the routine business of the bank such as is entrusted to the cashier, but would be, to use the language of *Morse, supra,* within "the domain of discretionary authority which pertains exclusively, and for the most part inalienably, to the directors."

The situation in this case well illustrates the wisdom of this rule as applied to all sales of property belonging to the bank, as distinguished from property pledged to the bank or otherwise within its control as security, in which first mentioned property the bank has an interest beyond the mere collection of a fixed sum covering a certain amount loaned, in which property the bank is interested not only to receive what it originally loaned upon the property, but all that the property is worth.

There is no evidence in the record to show the value of this stock. But the natural assumption is that it was worth far more than the cashier agreed to accept for it, otherwise there would not have been this litigation extending over a period of more than nine years. It is a reasonable inference from the

record that the cashier did not properly represent the bank in this matter. He admits that he knew nothing of the value of this stock (Tr. page 48), and that the bank's dealings with the Burnham Standeford Company had been conducted by others than himself (Tr. pages 46, 47), and that he did not rely on his judgment in the matter, but consulted with J. Dalzell Brown, who was neither an officer nor director of the bank, and as far as the cashier knew not even a stockholder, but who was a man who was expected to be soon in control of the bank (Tr. page 47).

We mention these facts appearing in the record, not because we believe they are necessary to show that the sale of such property as is here involved is a matter exclusively within the province of the board of directors, but because they well illustrate the wisdom of the well established rule of law (in support of which we shall cite the authorities in the next portion of this brief) that the cashier has no authority to sell property belonging to the bank, but that such matters, being outside the ordinary routine of the business of the bank, and being matters requiring the exercise of business judgment and discretion, are matters that come exclusively within the jurisdiction of the board of directors.

3. THE CASHIER OF A BANK HAS NO AUTHORITY UNDER THE AUTHORITIES TO SELL PROPERTY BELONGING TO THE BANK, THE CONTROL OF SUCH MATTERS, CALLING AS THEY DO FOR THE EXERCISE OF JUDGMENT AND DISCRETION, BEING EXCLUSIVELY VESTED IN THE BOARD OF DIRECTORS.

At the commencement of a comprehensive annotation in 31 L. R. A. n.s. 737 to the case of *Sponberg v. First National Bank,* 18 Idaho 524, 110 Pac. 716, the author says:—

> "The rule laid down in *Sponberg v. First Nat. Bank,* namely, that in contemplation of law the leasing or selling of bank property is not within the ordinary powers and duties of the cashier of the bank, is supported by practically all of the cases dealing with the question."

The following authorities support the proposition stated in the note above quoted that the cashier of a bank has no authority to sell property belonging to the bank, other than negotiable paper:—

Morse on Banks and Banking (4th Ed.) Section 158 (page 350, 351), 158;

Magee on Banks and Banking, Section 132;

5 Cyc, 475;

United States v. City Bank of Columbus, 21 How. (U.S.) 356, 16 Law. Ed. 130;

Martin v. Webb, 110 U.S. 14, 28 Law. Ed. 49, 52;

Bank of Commerce v. Hart, 37 Neb. 197, 55 N.W. 631, 20 L.R.A. 780, 40 Am. St. Rep. 479;

Leggett v. New Jersey Banking Co., 1 N.J. Eq. 451, 23 Am. Dec. 728;

Hoyt v. Thompson, 1 Selden (N.Y.) 320, 334;
Holt v. Bacon, 25 Miss. 567;
Lionberger v. Mayer, 12 Mo. App. 575;
Windsor v. Lafayette Co. Bank, 18 Mo. App. 675;
Burris v. Bank of Buffalo, 70 Mo. App. 675;
Asher v. Sutton, 31 Kan. 286, 1 Pac. 535;
Greenwalt v. Wilson, 52 Kan. 109, 34 Pac. 403;
Sponberg v. First Nat. Bk., 18 Idaho 524, 110 Pac. 716, 31. L.R.A. n.s. 736;
Bank of Gloster v. Hindman, 94 Miss. 742, 50 So. 65.

In *Morse on Banks and Banking,* Section 158, page 350, *supra,* the author says:

> "The cashier * * * has *no inherent authority* * * * *to give title to any other than negotiable property of the bank.*"

Then on page 351 (the italics again being ours):

> "All the bank's negotiable paper the cashier may negotiate and transfer on its behalf, and to this end may endorse it over, so as to bind the bank like any ordinary indorser on similar paper. *But the character of negotiability is a strict limitation upon his inherent power. He cannot solely by virtue of his office, pass title to a non-negotiable paper of any sort, or to any other description of corporate property,* as, for example, a judgment given in favor of the bank. His action in making transfers of this latter description can be sustained only by authority directly conferred by the board of directors, or arising from established usage."

Again, in paragraph (e) of Sec. 158, this limitation upon the cashier's power of disposition of the bank's property is thus stated:

> "A cashier cannot assign discounted bills and notes to a depositor in payment of his deposit. Assigning mortgages, *or disposing of the bank's property,* is a part of the management, and *belongs to the board of directors.*" (The italics are ours.)

Then in Sec. 169, at page 385, we find the following:

> "A bank is not bound by the cashier's contract with a broker for the sale or purchase of real estate, unless previous authority is shown, or unless estopped by a line of conduct recognizing such acts."

Magee (Seciton 132, *supra*) states the rule in the following language:—

> "As a general agent of the bank the cashier has authority to receive offers of purchase for the property or securities belonging to the bank; *but he is not authorized to dispose of or sell such securities without an order from the board of directors.*" (The italics are ours);

and then in section 146, at page 178, the author, in dealing with the limitations upon the cashier's powers, says:

> "The bank's property cannot be mortgaged only by resolution directing the same, emanating from the board of directors."

Obviously, if a cashier has no authority to mortgage the bank's property, he has no authority to sell it outright.

In 5 *Cyc* 475, *supra,* in the text dealing with the power of a bank cashier, the law is thus stated:

> "He has no authority to sell or encumber the bank's property, even to pay a debt."

The case of *United States v. City Bank of Columbus,* 21 How. (U.S.) 35, 16 Law. Ed. 130, *supra,* directly involves the question as to the absence of power in a bank cashier to act for the bank outside of the ordinary routine business of banking, and does not directly involve the question as to a cashier's authority in dealing with the property of the bank. However, what is said by Mr. Justice Wayne, on page 133, in dealing with the term "ordinary business" as applied to banking institutions and the powers of cashiers, is instructive. The part of the opinion referred to is as follows:

> "The term 'ordinary business,' with direct reference to the duties of cashiers of banks, occurs frequently in English cases, and in the reports of the decisions of our state courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. *Nor has it ever been decided that a cashier could purchase or sell the property* or create an agency of any kind for a bank which he had not been authorized to make by those to whom has

been confided the power to manage its business, both ordinary and extraordinary." (The italics are ours.)

Martin v. Webb, 110 U. S. 14, 28 Law. Ed. 49, *supra,* involved the power of the cashier to release a deed of trust; it was held in that case that the power was conferred by long acquiescence. On page 52, Mr. Justice Harlan says:

> "It is quite true, as contended by counsel for appellants, that a cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties; and that the ordinary business of a bank does not comprehend a contract made by a cashier, without delegation of power by the board of directors, involving the payment of money not loaned by the bank in the customary way * * * As the executive officer of the bank, he transacts its business, under the orders and supervision of the board of directors. He is their arm in the management of its financial operations."

In *Bank of Commerce v. Hart,* 37 Neb. 197, 55 N.W. 631, 20 L.R.A. 780, *supra,* it was held that a bank's cashier had no authority to accept insurance stock in payment of a debt due the bank. It was treated by the court as a purchase of the stock, and, although it was a purchase for the purpose of paying a debt due the bank, it was held that the cashier was without power to bind the bank. If he has not power to purchase stock, it would seem logically to follow that he had no power to sell it. The Court says:

> "The power of this bank to purchase stock in an insurance company, if it exists at all, is an extraordinary power, and one not confided to the cashier but belonging to the directory."

In *Leggett v. New Jersey Mfg. and Banking Co.,* 1 N.J. Eq. 541, 23 Am. Dec. 728, *supra,* it was held that the president and cashier of a bank had no authority by virtue of their offices to mortgage the property of the bank. Dealing with the powers of these officers, and especially of the cashier, the Court on page 553, says:

> "They acted either as general or special agents; or in other words, either in virtue of their general power, ex-officio, or of some special authority. If in virtue of their general powers as officers of the bank, they exceeded it, in undertaking to convey the real property of the corporation. The cashier is usually intrusted with all the funds of a bank, in cash, notes, bills, etc., to be used from time to time for the purposes of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He draws checks, from time to time, for moneys, wherever the bank has deposits. In short, he is the executive officer through whom, and by whom the whole moneyed operations of the bank, in paying or receiving debts, or discharging or transferring securities, are to be conducted."

In *Hoyt v. Thompson,* 5 N.Y. (1 Selden) 320, *supra,* at page 334, the Court says:

> "But the powers and duties of the president and cashier are not prescribed by the charter; no power is conferred upon them to mortgage, assign, or dispose of the property of the corpor-

> ation. This is a part of the management of the concerns of the company which is confided expressly to the directors, but not to the president and cashier. In no case has it been held that these officers have the power to do an act like that in question, without the assent and authority of the directors."

Holt v. Bacon, 25 Miss. 567, *supra*, was an action on a judgment in favor of the Planters' Bank and alleged to have been transferred to plaintiff. In holding that there was no transfer the Court says (the italics being ours):

> "Prima facie, *the cashier of a bank has no authority* to transfer judgments in its favor or *to dispose of its property. His authority, in this respect, extends only to negotiable instruments.* The president and directors were the only persons who could legally make the transfer. If the cashier acted as their agent in the matter, this fact ought to have been shown in evidence."

The case of *Lionberger v. Mayer, supra*, is not reported in full, but in 12 Mo. App. 575 the memorandum of the substance of the decision is as follows:

> "The power of a bank cashier to purchase for the bank is not implied from his office as cashier."

In *Windsor v. Lafayette County Bank*, 18 Mo. App. 665, *supra*, it was decided that a bank cashier had no authority to sell land belonging to the bank. On page 672, the Court says:

> "It is not among the ordinary duties of a cashier to bargain and sell real estate nor contract with brokers for that purpose. * * * It is

> an evident proposition that sales of real estate are not among the ordinary functions and duties of the cashier of a bank."

In *Burris v. Bank of Buffalo,* 70 Mo. App. 675, *supra,* it was decided that a bank cashier had no authority to bind the bank by his agreement to sell land belonging to the bank, or by his contract with a broker with relation to land belonging to the bank. The Court says:

> "These matters are wholly outside the ordinary duties of a bank cashier."

In *Asher v. Sutton,* 31 Kan. 286, 1 Pac. 535, *supra,* the president and cashier of a bank executed a bill of sale of a safe to plaintiff to pay the debt of the bank due her. In holding that there was no sale, the Court says:

> "The mere fact that they had conducted the business of the bank gave them no authority to make the sale, and as it is not claimed that the directors ever ratified their act, the plaintiff below was not the owner of the safe at the commencement of the action."

Greenwalt v. Wilson, 52 Kan. 109, 34 Pac. 403, *supra,* was an action by the receiver of a national bank for the conversion of a $2,000 horse. The case turned upon the question as to whether or not an attempted sale of the horse by the president and cashier of the bank passed title. On this point the Court says:

> "The pretended sale of the horse on December 8th, 1888, was without any authority of the

> bank, and neither Smith, as president, *nor Sims, as cashier, could make such sale of the bank's property.*" (The italics are ours.)

Defendants in error in the case now before this Court introduced evidence to show that a bank examiner had criticised the defendant bank for holding this stock; but it seems reasonable to suppose that a bank has as much power and that it is as reasonable for it to own and hold stock in another corporation, as it is for it to own and hold a $2,000 horse. And yet in *Greenwalt v. Wilson, supra,* it was held that the cashier and president had no authority to sell the $2,000 horse without authorization from the directors.

The case of *Sponberg v. First National Bank,* 18 Idaho 524, 110 Pac. 716, 31 L.R.A. n.s. 736, *supra,* involved the power of a bank cashier to lease property belonging to the bank. The Court, although it held that the cashier's unauthorized act was ratified by the directors, cited the case of *United States v. City Bank of Columbus,* 21 How. (U.S.) 356, 16 Law. Ed. 130, and quoted with approval the language quoted, *supra,* as follows:

> "Nor has it ever been decided that a cashier could purchase or sell property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary."

The opinion then continues:

> "This may well be accepted as the general rule of law applicable to such cases * * * *As a matter of law we take it to be well settled,* as indicated by the foregoing authority, *that the selling or leasing of the bank property is outside the ordinary business and duties of the cashier, unless he is specially authorized so to do.*" (The italics are ours.)

In the recent case of *Gloster v. Hindman,* 94 Miss. 742, 50 So. 65, *supra,* the Supreme Court of Mississippi, in holding that certain mortgages and sales of the bank's assets were void, said (the italics again being ours):

> *"There are limitations on the powers of the cashier of a bank to deal with the assets of the bank,* and we think that Rice went clear beyond any power that the courts have yet held a cashier to possess. Giving mortgages on the bank's property, and *transferring its assets, were not acts done by Rice within the usual scope of his authority, or in the usual course of business."*

It is readily apparent from a review of the foregoing authorities that the rule, as laid down by this Court in *United States vs. City Bank of Columbus, supra,* that the cashier has no power to sell property belonging to the bank without previous authority from the board of directors, is uniformly recognized and applied. The few apparent exceptions that may be cited on behalf of defendants in error are really not exceptions at all, but are either cases involving the sale of negotiable instruments, or cases where

the bank is estopped by a long course of conduct or by a retention of the benefits from denying the cashier's power, or cases where the cashier is expressly authorized by the board of directors.

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4. THERE IS NOTHING IN THIS CASE TO TAKE IT OUTSIDE OF THE GENERAL RULE AS TO THE SALE OF PROPERTY BELONGING TO THE BANK.

It was expressly conceded in the opinion rendered in this case by the Supreme Court of California (Tr. page 58) that

> "The sale of property held by the bank for investment or similar purposes is not part of the ordinary business of the bank,"

and that such acts

> "are beyond the scope of the ordinary business of the bank, acts, that is to say, which call for the exercise of judgment or discretion affecting the policy to be pursued, are to be performed by or under the mandate of the directors, while acts that are included in the ordinary business are propertly to be done by the cashier."

One would have thought that such a recognition of the rule for which the bank contends would have disposed of this case in favor of the bank. But having correctly stated the rule, the Supreme Court of California held that the rule did not apply to the sale of the 599 shares of stock of the Burnham Standeford Company for reasons that, we believe, are neither logical nor sound, and for reasons that

show, we believe, a lack of appreciation of the foundation and reason for the rule that sale of property *belonging* to the bank falls within the scope of the powers of the directors, and not within the scope of powers of the cashier.

The reasons advanced by the state court for holding that the general rule did not apply were as follows (Tr. pages 58, 59):—

1. That the stock was originally pledged to the bank;

2. That a national bank has no power to deal in corporate stocks, though it may take title, as here, as an incident to its power to make loans on the security of corporate stock;

3. That, when title is thus acquired, it is the bank's duty to sell "as soon as a sale could, to proper advantage, be made";

4. "The national bank examiners had criticized the defendant bank for retaining this stock so long";

5. "The resale of such stock may properly be regarded as one of the steps taken in the process of collection" * * * and "therefore, we think, a part of the ordinary business of the bank."

The reasons thus advanced do not lead to the conclusion that the sale of this stock was part of the ordinary routine business of the bank calling only for the exercise of mere "executive functions," and

not coming within "the domain of the discretionary authority which pertains exclusively, and for the most part inalienably to the directors" *(Morse on Banks and Banking,* Section 152, page 333, *supra).* In fact the reasons advanced seem to lead to precisely the opposite conclusion.

The fact that the stock was originally held as security cannot affect the rule, because by no other means may a national bank acquire title to such property as that involved in the cases above cited. It is not the *means* by which the bank acquired title, as these are in practically all instances the same, but the *fact* of title, and the fact that the bank is interested *beyond* receiving back its principal and interest, that makes the sale a discretionary matter, and not one of the ordinary routine transactions of the bank.

Surely the fact that a national bank has no authority as a part of its banking business, to deal in stocks, *cannot* lead to the conclusion that it is part of its ordinary routine business to sell the stock owned by it. A mere statement of the proposition shows that the ownership and sale of this stock was something outside of the routine business of the bank.

Then the next reason advanced, i. e., that it was the bank's duty to sell "as soon as a sale could, to proper advantage, be made," shows on its face that the sale was not a routine matter calling for the

exercise of only executive functions, but was a matter calling for the exercise of discretion and judgment in the determination of the question as to *when* the sale could be made "to proper advantage," and *what* was "proper advantage" in the case of this particular sale.

The next reason advanced is that "the national bank examiners had criticized the defendant bank for retaining the stock so long." But it does not appear that the examiners had criticized the cashier, or that any criticism of the bank could confer additional power on the cashier. If the directors had chosen, as they apparently had done, to hold this stock for three years, while waiting for the "proper advantage" with which to sell the stock, neither the directors' delay nor the bank examiner's criticism could clothe the cashier with new powers.

We respectfully submit that the reasoning of the state court does not at all tend to show that this case should be taken out of the general rule that a cashier has no authority to sell property belonging to the bank and that such sales are matters exclusively within the province of the board of directors. In fact, the reason for and wisdom of the rule is illustrated by the special features present in this case and already referred to, both those mentioned in the opinion of the state court, and those others that we mentioned earlier in this brief, namely, that the stock had no market value, that its value was a mat-

ter of conjecture, and a subject upon which the cashier had no knowledge, that the stock had been carried by the bank in its bond and investment account for three years, that the dealing in such property was no part of the banking business and something entirely outside of both the experience and duties of the bank's cashier, the fact that the cashier attempted to sell the stock for the amount of the loan with interest (and at that less than one year's interest, when three years' interest was due) and without any regard whatever for the *value* of the stock and without any knowledge of its value, and without any thought as to the "proper advantage" to the bank by which the *best* price and the *full* value should be received, regardless of the amount for which the stock was originally given as security.

It was the right and the duty of the bank, once having acquired the full ownership of the property formerly held under pledge, to sell it for its *full* value. The profit the bank could have made on this particular pledge would have taken care of the losses on other pledges, and it was the duty of the directors, and their right, to sell to the best advantage and for the largest price obtainable. It was not simply a part of the ordinary transaction of collecting a fixed principal and interest, in which the bank was only interested to the extent of receiving its principal and interest. It was therefore no part of a

transaction that comes within the province of the cashier. It was a matter exclusively within the province of the board of directors.

The suggestion in the opinion of the state court that because it was not within the scope of banking business to deal in corporate stocks the rule for which we contend should not apply, and also the suggestion that the stock in question was originally taken as a pledge and for that reason the rule should not apply, as we have already seen, demonstrate a lack of appreciation of the reasons for the rule and of the rule itself. But these suggestions are further shown to have been of no force as taking the case out of the rule, when one considers the fact that they apply equally well to the cases cited by us in the third subdivision of this brief and which cases firmly establish the very rule upon which we rely.

Thus *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N.J. Eq. 541, 23 Am. Dec. 728, *supra*, involved the attempt of the cashier to mortgage land; *Spongberg v. First Natinoal Bank*, 18 Idaho 542, 110 Pac. 716, 31 L.R.A. 736, *supra*, involved the attempt of the cashier to lease land belonging to the bank; *Windsor v. Lafayette County Bank*, 18 Mo. App. 675, *supra*, and *Burris v. Bank of Buffalo*, 70 Mo. App. 675, *supra*, both involved the absence of power of the cashier to sell land. But the bank has no more authority to buy and sell land than it has to buy and

sell corporate stock. It is reasonably certain that in each of these cases the bank acquired title to the land through enforcing its rights as mortgagee, and the sale or mortgage or lease of its land was a means of realizing on the security and of collecting the money originally owed to it. But the courts held that the cashier had no authority to make the sales or the mortgage or the lease; and, as far as we are aware, the authority of those cases has never been questioned. If the reasoning of the state court is sound, the rule denying the cashier's power to deal with property belonging to the bank should not have been applied in any of the cases mentioned above.

Furthermore, *Greenwalt v. Wilson,* 52 Kan. 109, 34 Pac. 403, *supra,* involved the power of the cashier and president acting together to sell a $2,000 horse. The suggestions made by the state court in reference to the sale of the corporate stock are particularly applicable to the sale of a horse. Certainly a bank has no inherent power to deal in horses, and it could only have acquired title by enforcing its rights as mortgagee. The sale, therefore, of the horse was a means of its realizing on its loan. It certainly was the duty of the bank to sell the horse "as soon as the sale could, to proper advantage, be made" (Tr. page 59). But the Kansas court properly held the cashier, even when abetted by the president, had no authority to sell the horse. We can think of no

reason why the rule that was applied in the case of the horse should be denied application in the case of the corporate stock.

We respectfully submit that there is nothing in this case to take it out of the general rule, the existence and soundness of which is conceded by the state court, that the cashier has no authority to sell property belonging to the bank, and that the control of such matters is vested exclusively in the board of directors.

Inasmuch as practically all of the property owned by a national bank, other than its banking premises and negotiable paper, is acquired, if legally acquired at all, much as the corporate stock involved in this case was acquired, by indirect means, as an incident to its general banking business, the exception which the state court seeks to engraft upon the rule would be for all practical purposes an abrogation of the rule itself.

We do not believe that such an abrogation of this salutary rule should receive the approval of this Court. This rule has become firmly established by a long line of decisions, and stands as one of the safeguards by which the law has protected national banks and their depositors against improvident and unlawful acts of one of its officers who has general charge and supervision of its ordinary business, but not of such business as the sale of property belonging to the bank.

We respectfully submit that the judgment of the Supreme Court of the State of California should be reversed, and that judgment should be entered for plaintiffs in error.

Respectfully submitted,

R. M. FITZGERALD,

CARL H. ABBOTT,

CHARLES A. BEARDSLEY,

Attorneys for Plaintiffs in Error.